92-240

Supreme Court, U.S.
FILED
AUG 4 1992
OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ROBERT ALLEN MOORE,
Petitioner,

v.

THE STATE BAR OF TEXAS,
Respondent.

Petition For Writ Of Certiorari To The Supreme Court of Texas

PETITION FOR WRIT OF CERTIORARI

JACK N. PRICE
State Bar No. 16293000
410 Congress Avenue
Second Floor
Austin, Texas 78701
(512) 474-1563
FAX# (512) 474-4727
Attorney For Petitioner

Alpha Law Brief Co.* 6113 Aletha Lane* Houston, Texas 77081 (713)981-9000

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QUESTIONS PRESENTED FOR REVIEW

1. Was the petitioner, Robert Allen Moore, denied due process of law to which an attorney in a disbarment proceeding is entitled by failing to allow him an opportunity to be heard and defend the charges on which the State Bar of Texas based its petition for disbarment?

2. Was the petitioner denied due process of law by the action of the trial court in allowing new claims and charges against him to be introduced in evidence during the disbarment trial without fair notice of them or opportunity to defend them?

LIST OF PARTIES

Counsel of record certifies that the following is a list of all parties to the proceedings in the Supreme Court of Texas:

ROBERT ALLEN MOORE

THE STATE BAR OF TEXAS

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OPINIONS BELOW

The Orders of the Supreme Court of Texas denying Petitioner's Application for Writ of Error and Motion for Rehearing of the Application for Writ of Error, the Opinion and Judgment of the Fourth Court of Appeals, San Antonio, Texas, and the Judgment of the District Court of Val Verde County, 63rd Judicial District, are contained in the Appendix.

JURISDICTION

The Supreme Court of Texas denied petitioner's motion for rehearing of petitioner's application for writ of error on May 6, 1992. This Court has jurisdiction under 28 U.S.C.A. § 1254(1). This petition is timely filed under U.S. Sup. Ct. Rule 13.1. 28 U.S.C.A.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional and statutory provisions and regulations involved in this case are:

Sec. 1 of the Fourteenth Amendment to the United States Constitution, which states in pertinent part that:

> [n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Art. I, § 19 of the Texas Constitution which states:

> No citizen of this state shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.

Art. I, § 13 of the Texas Constitution which states that:

> [e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual

> punishment inflicted. All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.

Secs. (4) and (5) of Texas State Bar Rule 18(4) and (5), Tex. Gov't. Code Ann., Title 2, subt. G App., Art. 10 § 18, which require that a disciplinary petition allege:

> (4) a brief description of the acts and conduct that gave rise to the claimed professional misconduct sufficient to give fair notice, which allegations may be grouped in one or more counts;
>
> (5) the disciplinary rule or rules allegedly violated by such acts and conduct or other grounds for seeking sanctions.

STATEMENT OF THE CASE

Judgment of disbarment was entered against Robert Allen Moore ("Moore") based on a jury finding that he had engaged in "conduct involving dishonesty, fraud, deceit, or misrepresentation," on February 20, 1990, in Cause No. 17,508, 63rd Judicial District court, Val Verde County, Texas, Judge Curt Steib, Presiding. Tr. 407-11, 439-41.

The State Bar of Texas ("State Bar") filed suit for disbarment on January 11, 1988. Tr. 8. Its trial pleadings, S.F. 377-82, alleged that in the spring of 1983, Moore asked his employee and client, Mark Taylor, to seek the assistance of Taylor's aunts in obtaining a line of credit for Moore, and that, at Moore's request, Taylor approached his aunts about utilizing their certificates of deposit as collateral for a loan of $100,000.00, and a second loan of $830,000.00. S.F. 377-

78. To secure the first loan, the State Bar alleged, Moore represented to Taylor that if Moore was unable to secure the loan, he would have to withdraw from representing Taylor, Tr. 378, and to secure the second loan, Moore represented to the aunts, Mary and Blanche J. Taylor:

> (1) that if the loan were not made, respondent would have to withdraw from representing [Mark] Taylor because of [Moore's] financial difficulties in continuing operation of his law firm and that said case would thereby be jeopardized;
>
> (2) a settlement and/or a trial value of a number of respondent's personal injury cases; and
>
> (3) that settlement funds sufficient to cover the pay off of the loan would be received prior to maturity of the loan.

Tr. 379.

The State Bar claimed that these representations were false and were fraudulently made for the purpose of inducing the Taylor aunts to pledge their C.D.'s as collateral for the loans, and that the Taylor aunts would not have done so had the misrepresentations not been made. Tr. 379-80. On the basis of these allegations, the State Bar claimed that Moore violated Disciplinary Rules 1-102(A)(1)[1] (providing that a lawyer shall not violate a disciplinary rule), 1-102(A)(2) (providing that a lawyer shall not circumvent a disciplinary

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1. The Disciplinary Rules are contained in Tex. Gov't. Code Ann., Title 2, subt. G art. 10, § 9.

rule through actions of another), 1-102(A)(4) (providing that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation), and 1-102(A)(6) (providing that a lawyer shall not engage in any other conduct that adversely reflects on his fitness to practice law).

The case went to trial Feb. 20, 1990. During cross-examination of Mark Taylor, Moore's counsel, Mr. Boldrick, attempted to impeach Taylor with an affidavit Taylor had given to the Ector County Grievance Committee in June 1984. When Mr. Boldrick inquired about the affidavit, the court, after excusing the jury, stated that Mr. Boldrick would be allowed to impeach but if he went into where the affidavit was given, it was going to be "Katie bar the door," S.F. 286-87, and that was "going to open it up." S.F. 287. After the jury returned, Mr. Boldrick attempted to cross-examine Taylor about the affidavit, but the court interrupted, stated that the attempted impeachment was improper, sustained objection to it, and instructed Mr. Boldrick to move on to something else. S.F. 289. Mr. Boldrick then examined Taylor outside the presence of the jury for the purpose of a bill of exceptions. S.F. 291-311. During this examination, Mr. Douthitt and Mr. Bridges, counsel for the State Bar, interrupted, Mr. Bridges stating that "if counsel will let me reopen I'll introduce the affidavit," and Mr. Douthitt saying "under Rule 1.06 (sic) of optional completeness, if he is going to put in any of it, I want the whole thing in." S.F. 304, 306. Shortly thereafter, the court stated that Mr. Boldrick could use the affidavit for any purpose he wanted to use it, and, if it was used, "the rest of it comes in under 1.06 (sic)." The State Bar then withdrew its objections to the affidavit and the court withdrew its rulings on its admissibility. S.F. 311.

When cross-examination of Taylor resumed before the jury, Mr. Boldrick asked if Taylor had stated, in June 1984, that Moore was not breaching or breaking any legal duty to him or his aunts. After Taylor answered, Mr. Boldrick read the following portion of Taylor's affidavit:

> Upon Richard's return he expressed great concern over what I had done, and along with me, began to review the situation. To a degree Richard felt a professional responsibility to Mr. Moore, insofar as Mr. Moore was not breaching any legal or ethical duties to myself or my aunts. So, at this juncture, Richard confined his remarks to the questionable value of the 18 lawsuits mentioned hereinabove.

S.F. 315, Tr. 582.

During redirect examination of Taylor, the State Bar's counsel, Mr. Bridges, offered the entire Taylor affidavit in evidence as Pet.'s Ex. 14, over objection by Mr. Boldrick that it "violates several of the rules of evidence including bolstering," that it served no purpose, that it covered matters beyond the scope of the trial, and that it did not show completeness of the statement offered. S.F. 344-45. The court interrupted and overruled the objection, and admitted the affidavit "under Rule 106." S.F. 345. The State Bar read selected statements from the affidavit to the jury, S.F. 345-46, and it was sent to the jury room with the rest of the exhibits during the jury's deliberations.

Thus, despite the fact that the State Bar's petition gave notice only of the claim that Moore made misrepresentations to Mary and Blanche J. Taylor to induce them to pledge their C.D.'s for the loans to Moore, the trial

court, at the insistence of the State Bar, allowed the introduction of the affidavit in its entirety. In the affidavit, Taylor accused Moore of the following wrongful acts in addition and extraneous to the claim of misrepresentation with which he was charged: (1) "constant self-promotion," Tr. 579; (2) being in "extreme financial trouble," *id.*; (3) running through "the entire million [dollars borrowed] very quickly," Tr. 582; (4) refusing to try to settle Taylor's probate case "saying he could not afford it that tax year," *id.*; (5) engaging in business from his trust account, including paying personal bills, firm obligations, loans or "other activities," *id.*; (6) constantly paying off one client or group of clients late "and hoping more money would come in soon to pay the client or group of clients now far over due for their money," *id.*; (7) spending "in excess of 50% of his time juggling the accounts in trying to get money back into the trust account which had already been spent," *id.*; (8) participating in activities which were unethical, Tr. 583; (9) firing two secretaries, who appeared before the grievance committee regarding use of trust funds and other matters, *id.*; (10) "constantly misrepresenting the value of pending cases," *id.*; (11) "making promises he did not keep," *id.*; (12) "alternating between despondent and threatening moods and demeanor and irrationality," *id.*; (13) "threatening to kill himself," *id.*; (14) threatening to see to it that lawsuits and proceeds disappeared in his Del Rio office "or across the border," *id.*; (15) constantly representing to Taylor's aunts, and Taylor, "that he [could not] avoid [the] debt legally, in any way, and that a professional corporation cannot file bankruptcy," *id.*; and (16) making other misrepresentations "too numerous to mention here but there are many." *Id.*

These acts constituted offenses with which Moore was not charged in the State Bar's petition, yet the trial court allowed them to be introduced in evidence after the trial had commenced, without advance notice to Moore, and Moore

was not allowed time or opportunity to prepare a defense to the additional allegations. The trial court justified its action on the basis of "[Tex. R. Civ. P.] Rule 106," which permits introduction of a writing or recorded statement which "ought in fairness to be considered contemporaneously" when "a writing or recorded statement or part thereof is introduced by a party." Under this rule, an "opponent against whom a part of an utterance has been put in evidence, may, in his turn, compliment it in order to secure a complete understanding of the tenor and effect of the utterance," subject to the following rules:

> (a) No utterance irrelevant to the issue is receivable;
>
> (b) No more of the remainder of the utterance than concerns the same subject, and is explanatory of the first part, is receivable;
>
> (c) The remainder thus received merely aids in the construction of the utterance as a whole, and is not in itself testimony.

Wigmore, *Evidence in Trials at Common Law*, § 2113, at pp. 523-24 (1978). In short, only the whole of the matter on the same subject, if relevant, may be put in. *Id. Bedner v. Federal Underwriters Exchange*, 133 S.W.2d 214, 218 (Tex. Civ. App. -- Eastland 1939, no writ); *Travelers Ins. Co. v. R.C. Creyke*, 446 S.W.2d 954, 957 (Tex. Civ. App. -- Houston [14th Dist.] 1969, no writ).

The case was submitted to the jury on a single question inquiring whether Moore, in his dealings with Mary Taylor or Blanche Taylor, engaged in conduct involving

dishonesty, fraud, deceit, or misrepresentation. The jury answered "Yes." Affidavits obtained from jurors following the trial indicate that the Taylor affidavit had a material influence on the answer. See the affidavits of Cecilia Meza and Maria Marta Rodriquez, attached as Appendices "A" and "B."[2] The extraneous, unrebutted hearsay allegations in the affidavit were improperly admitted and so tainted the trial and the jury's verdict that Moore was denied due process of law. Moore complained in the Fourth Court of Appeals, San Antonio, Texas, and in the Supreme Court of Texas that the trial court committed reversible error in admitting the affidavit in evidence and allowing it to be taken to the jury room during the jury's deliberations, because petitioner had no notice of the extraneous charges, was not afforded an opportunity to be heard or to defend himself, and thus was denied the constitutional safeguards of due process guaranteed all citizens by the Constitutions of the United States and of the State of Texas, but the complaints were rejected.

REASONS FOR GRANTING THE WRIT

I. PETITIONER WAS NOT GIVEN FAIR NOTICE OF THE CHARGES IN THE TAYLOR AFFIDAVIT OR OPPORTUNITY TO DEFEND THEM.

The Fourteenth Amendment due process clause and its guarantees apply to attorney disbarment proceedings. *Musslewhite v. State Bar of Texas*, 786 S.W.2d 437 (Tex. App. -- Houston [14th Dist.] 1990).

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2. These affidavits were submitted in support of motion for new trial, but the trial court refused to allow them to be filed.

> It is universally agreed that adequate notices lie at the heart of due process. Unless a person is adequately informed of the reasons for denial of a legal interest, a hearing serves no purpose - and resembles more a scene from Kafka than a constitutional process.

Cosby v. Ward, 843 F.2d 967, 982 (7th Cir. 1988).

The primary requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections. *Searcy v. The State Bar of Texas*, 604 S.W.2d 256, 260 (Tex. Civ. App. -- San Antonio 1980, writ ref'd n.r.e.). To this end, Texas State Bar Rule 18(5), Tex. Gov't. Code Ann., Title 2, subt. G, art. 10, § 18(5), provides that a disciplinary petition shall allege:

> (4) a brief description of the acts and conduct that gave rise to the claimed professional misconduct sufficient to give fair notice, which allegations may be grouped in one or more counts;
>
> (5) the disciplinary rule or rules allegedly violated by such acts and conduct or other grounds for seeking sanctions...

Failure to comply with this rule, e.g., by omitting to enumerate each ground on which a disciplinary proceeding is based, "creates a significant potential for lack of notice that, in a proper case, might require reversal." *Vander Voort v. State Bar of Texas*, 802 S.W.2d 332 (Tex. App. -- Houston [1st Dist.] 1990, writ denied).

An attorney must be notified of the precise issues to be raised in the disciplinary hearings, *In re Ruffalo*, 390 U.S. 544, 550-551, 88 S. Ct. 1222, 1225-1226, 20 L. Ed. 2d 117 (1968), *Camacho v. Bowling*, 562 F. Supp. 1012, 1020-1022 (N.D. Ill. 1983), and such notice must be provided "at a meaningful time." *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. 2d 62 (1965). The entire process must be consistent with "principles of right and justice." *Zambrano v. City of Tustin*, 885 F.2d 1473, 1480 (9th Cir. 1989) (quoting *In re Ruffalo, supra*, at 1222). Disciplinary and disbarment actions are, as this Court said in *Ruffalo*,

> adversary proceedings of a quasi-criminal nature. *Cf., In re Gault*, 387 U.S. 1, 33, 87 S. Ct. 1428, 1446, 18 L. Ed. 2d 527. *The charge must be known before the proceedings commence. They become a trap when, after they are under way, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh.* (emphasis ours).

In *Ruffalo*, the Court considered whether an Ohio disbarment proceeding was wanting in due process because of lack of notice and opportunity to be heard. The Court found that the attorney was denied procedural due process because he did not receive fair notice as to the reach of the grievance procedure and the precise nature of the charges against him, even though he was granted several months to respond to an additional charge made after the disbarment proceeding commenced. The Court concluded that this denial required that the sanctions imposed be vacated.

In this case, admission of the Taylor affidavit injected new charges of "dishonesty, fraud, deceit, or misrepresentation" against Moore which far exceeded the reach of the State Bar's petition. However, unlike *Ruffalo*, Moore was given no opportunity to prepare for or respond to the additional charges. Even if he had been given an opportunity to respond during the trial, he would have been denied due process because the charges must be known before the proceeding commences. *Ruffalo, supra*, at 1226.

The Supreme Court of the State of Arizona reversed the disciplinary action taken against an attorney in the case of *Matter of Myers*, 795 P.2d 201 (Ariz. 1990) for the same reason given in *Ruffalo*, holding that an attorney "may not be charged with one violation and then, without opportunity for hearing or presentation of evidence, be disciplined for another." *Id.*, p. 204-05. Citing *Ruffalo* for the proposition "that a lawyer has a right to procedural due process in state bar proceedings," the court said that

> [i]n effect, the dissent argues that respondent may be charged with specified offenses and, despite the lack of evidence to support those charges, be found to have committed others that were neither charged nor the subject of any hearing. We reject such a proposition as failing to comport with elemental due process.

In *Myers*, the State Bar made additional charges without amending its complaint and gave the attorney no opportunity to respond. The same thing occurred in this case. Moore, like Myers, was denied due process, *In re Ruffalo, supra*, at 1222; *see In re Oliver*, 333 U.S. 257, 273, 68 S. Ct. 499, 507, 92 L. Ed. 682, 694 (1948); he cannot be excluded from the practice of law for reasons which violate due process requirements. *Matter of Peterson*, 439 N.W.2d

165, 166 (Iowa 1989); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-39, 77 S. Ct. 752, 756, 1 L. Ed. 2d 796, 801 (1957).

In *Louisiana State Bar Ass'n v. McGovern*, 481 So.2d 574 (La. 1986), the question raised was whether it would be a denial of due process of law for a court to find a lawyer guilty of charges based on evidence adduced at an evidentiary hearing if he was not given notice of the charges prior to the hearing. The Louisiana Supreme Court reached the same result as was reached in *Ruffalo* and the other cases cited above, and stated that

> [d]isbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. *Ex Parte Garland*, 4 Wall. (71 U.S.) 333, 380, 18 L. Ed. 366, 370 (1867); *Spevack v. Klein*, 385 U.S. 511, 87 S. Ct. 625, 628, 17 L. Ed. 2d 574, 577 (1967). Thus, he is accordingly entitled to procedural due process, which includes fair notice of the charge. *In re Ruffalo*, 390 U.S. 544, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968). *See In re Oliver*, 333 U.S. 257, 273, 68 S. Ct. 499, 507, 92 L. Ed. 682, 694 (1948). As stated in *Randall v. Brigham*, 7 Wall. (74 U.S.) 523, 540, 19 L. Ed. 285, 293 (1869), in proceedings for disbarment which are "not taken for matters occurring in open court, in the presence of judges, notice should be given to the attorney of the charge made and an opportunity afforded him for explanation and defense."

Id. at 576. Citing *Ruffalo, supra* at 1226, the court said that "[s]uch procedural violations of due process would never pass muster in any normal civil or criminal litigation." *Id.*

Ruffalo pointed out that proceedings become nothing more than a trap for the unwary when, after they are underway, the charges are amended on the basis of the testimony of the accused. Because Moore had no notice that the acts or omissions alleged in the Taylor affidavit would be considered in the disbarment proceeding, he was denied due process by the trial court's action in allowing the jury to consider them. *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972); *United States v. Cooper*, 675 F. Supp. 753, 757 (D.R.I. 1987); *Blake v. Morford*, 563 F.2d 248 (6th Cir. 1977). Due process prohibits sanctioning an attorney for unrelated misconduct of which he has not been given fair notice. *Louisiana State Bar Ass'n v. Boddie*, 534 So. 2d 944, 946 (La. 1988); *Louisiana State Bar Ass'n v. Keys*, 567 So. 2d 588, 591 (La. 1990); and *Louisiana State Bar Ass'n v. McGovern*, 481 So. 2d 574 (La. 1986). *See also State ex rel. NSBA v. Kirshen*, 232 Neb. 445, 441 N.W.2d 161 (1989).

A disciplinary agency cannot sanction a licensee based on evidence of misconduct that comes to light during the trial unless it has been fairly charged in the petition. *Shields v. City of Shreveport*, 579 So. 2d 961, 968 (La. 1991). *See also Burdge v. State Board of Medical Examiners*, 403 S.E.2d 114, 116-17 (S.C. 1991), holding that failure to give fair notice of allegations against the licensee constituted a denial of procedural due process. In *Comm'n on Pro. Ethics and Conduct v. Wenger*, 454 N.W.2d 367, 369 (Iowa 1990) the Iowa Supreme Court stated that

> allegations of professional misconduct portend severe penalties and thus carry with them "substantial procedural due process protections." *Committee on Professional Ethics & Conduct v. Behnke*, 276 N.W.2d 838, 842 (1979), appeal dismissed, 444 U.S.

> 805, 100 S. Ct. 27, 62 L. Ed. 2d 19 (1979); *accord Committee on Professional Ethics & Conduct v. Michelson*, 345 N.W.2d 112, 114 (Iowa 1984). . . . In *Ruffalo*, the court recognized that when charges are not lodged against an attorney until the disciplinary proceedings are underway and the respondent has testified, the process may be transformed from a search for the truth to a trap for the unwary. *Id.* at 551, 88 S. Ct. at 1226, 20 L. Ed. 2d at 122 (1968); *see also Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 656 n. 18, 105 S. Ct. 2265, 2284 n. 18, 85 L. Ed. 2d 652, 675 n. 18 (1985). In ordinary civil or criminal litigation, such a violation of procedural due process would "never pass muster." *Ruffalo*, 390 U.S. at 551, 88 S. Ct. at 1226, 20 L. Ed. 2d at 652, 122. Because lawyer disciplinary actions are quasi-criminal in nature, the Court held, "the charge must be known before the proceedings commence." *Id.* at 551, 88 S. Ct. at 1226, 20 L. Ed. 2d at 122.

In *Plunkett v. Estelle*, 709 F.2d 1004, 1009 (5th Cir. 1983), the Fifth Circuit held that the difference between defenses for different charges

> obviously would effect (sic) the defensive preparation. It is basic notice which was denied where the jury could have convicted Plunkett of a distinct crime with which he was not charged. We cannot find that denial to have been harmless. The denial was unconstitutional and prejudiced the defendant. *See also United States v. Fooladi*, 746 F.2d

1027 (5th Cir. 1984); *Cupp v. Naughten*, 94 S. Ct. 396, 414 U.S. 139 (1973).

Injection into evidence of the additional claims and charges contained in the Taylor affidavit likewise denied basic notice and unconstitutionally prejudiced Moore. As in *Plunkett*, this prejudice must be considered in the context of the entire trial, or, as Judge Higginbotham observed "in the courtroom scene with all the props and scenery that there existed." *Id.* at 1008. *Plunkett* dealt with a situation (submission of an erroneous charge) where the burden of proving denial of due process is more onerous than the burden in this case, which requires only a showing that claims and charges beyond those in the State Bar pleadings were allowed in evidence; nevertheless the facts of this case satisfy the *Plunkett* test for reversal. A reasonable jury could have considered (and, in fact, did consider) the claims in the Taylor affidavit in arriving at the verdict against Moore. This requires reversal.

The privilege of practicing law is not a matter of grace and favor. *Matter of Thalheim*, 853 F.2d 383, 389 (5th Cir. 1988). An attorney's license to practice law is a "right" which cannot lightly or capriciously be taken from him. *Ex parte Wall*, 107 U.S. 265, 288, 2 S. Ct. 569, 589, 27 L. Ed. 552 (1883). When the State Bar of Texas undertook to sanction Moore, it was incumbent upon it to scrupulously observe its own disciplinary rules and procedures. This it failed to do. The lack of notice of the charges against Moore in the Taylor affidavit so infected the proceeding that the judgment of disbarment must be reversed.

II. PETITIONER WAS NOT GIVEN THE OPPORTUNITY TO BE HEARD AND DEFEND THE ORIGINAL CHARGES AGAINST HIM.

In addition to being denied adequate notice of or opportunity to defend the charges and claims contained in the Taylor affidavit, Moore was denied adequate opportunity to be heard on the original claims contained in the disciplinary pleading.

Moore had made substantial repayment on the loans to the Taylor aunts prior to trial, but the trial court granted the State Bar's motion in limine restricting introduction of evidence of repayment. Tr. 425. During trial, Moore's counsel objected to testimony concerning events after Dec. 1, 1983, on the ground that the State Bar had stated in answer to an interrogatory that it did not contend that any misrepresentations were made after that date. S.F. 165-69. The court responded that it would sustain the objection and rule that transactions after Dec. 1, 1983, were not to be mentioned before the jury, but only on condition that Moore's counsel not tell the jury that there was no evidence that the Taylor aunts were damaged. S.F. 170-74. When this assurance was not forthcoming, the court overruled the objection, saying that the evidence would not be allowed to show a breach of professional responsibility, but would be allowed "to complete the transaction that is already before the jury." S.F. 175-76. The court thereafter permitted evidence that Moore defaulted in payment of the loan, and that the C.D.'s were applied to the loan. S.F. 190-91.

Moore's counsel then sought to introduce evidence of payments made by Moore on the indebtedness after default, which the court had ruled inadmissible in sustaining the State Bar's motion in limine. S.F. 460. The court stated that "the motion in limine stands," and barred evidence of Moore's

payments on the loan. *Id.* Later, the court sustained objection to a question to Moore by his counsel regarding whether, in June 1984, Mary and Blanche J. Taylor sent him a written proposal regarding supervision of his law firm and allocation of income the firm received to payment of the debt. S. F. 465-66. Moore took exception to the ruling in which he detailed his counteroffer and efforts to make arrangements to pay the amounts owing. The court ruled that the testimony was not material and would open up "other areas" regarding collection of the debt. S.F. 480-81.

In addition to permitting the State Bar to introduce evidence of default and refusing to allow Moore to introduce evidence of payments on the loan, the trial court refused to allow Moore to introduce evidence that the Taylor aunts had filed suit to accelerate the note, which forced Moore into a Chapter 11 Bankruptcy proceeding. The court also refused to allow evidence that after taking bankruptcy, Moore entered into an agreement approved by the Taylor aunts pursuant to which he made substantial additional payments on the loan, and evidence that he could have filed a Chapter 7 bankruptcy proceeding if he had intended to avoid repayment of the debt. These rulings presented a false picture of Moore as having secured the loan without any intent to repay it, which gave unwarranted credence to the contention that the Taylor aunts had been fraudulently induced to pledge their C.D.'s for the loan.

The prejudicial effect of these rulings was further aggravated by argument of State Bar counsel, who, after prevailing on the court to admit evidence that Moore defaulted in payment of the note and preventing evidence of the cause for the default, payments made, and arrangements for repayment, told the jury, in final argument, that Moore utilized the love and affection the aunts had for their nephew, Mark Taylor, "to get what he wanted, which was to wipe out

his debts and walk away." S.F. 2/23/90, p. 14. In truth and in fact, Moore had made and was making substantial repayments up to and at the time of the trial, a fact well known by the State Bar.

The trial court recognized that it was the State Bar's burden to prove that Moore knowingly made false statements and intended that the aunts rely on them, thereby fraudulently inducing the Taylor aunts to collateralize the loans. *Id.*, pp. 3-5. Nevertheless, the court prohibited Moore from introducing evidence which established that he had no intent to defraud, while allowing the State Bar to bolster its case improperly by arguing that Moore never intended to repay the loan, but intended only to get his debts paid "and walk away." Moore was thus denied due process by being refused the "opportunity to be heard," *i.e.*, to offer evidence of payments and efforts to repay the loan which was probative, admissible, and directly responsive to the claim of "fraud, dishonesty, deceit, and misrepresentation."

As stated in *Ruffalo, supra* at 1226, footnote 4:

> The Ohio State Bar Association and Mahoning County Bar Association, *amici curiae* in support of the order of the Court of Appeals, argue that there was no due process violation because the State Board gave petitioner several months to respond to charge No. 13. This argument overlooks the fact that serious prejudice to petitioner may well have occurred because of the content of the original 12 specifications of misconduct. He may well have been lulled "into a false sense of security" (*Bouie v. City of Columbia*, 378 U.S. 347, 352, 84 S. Ct. 1697, 1702, 12 L. Ed. 2d 894) that he could rebut charges Nos.

> 4 and 5 by proof that Orlando was his investigator rather than a solicitor of clients. In that posture he had "no reason even to suspect" (*ibid*) that in doing so he would be, by his own testimony, irrevocably assuring his disbarment under charges not yet made.

In this case, Moore sought to introduce in his defense the three sentence excerpt from the Taylor affidavit for impeachment purposes after Taylor denied he had said that Moore did not breach any legal duty to him or his aunts. S.F. 314-15. None of the remainder of the Taylor affidavit even closely related to or explained the three sentences used to impeach Taylor, and should not have been admitted under any circumstance. Certainly, it should not have been admitted when the result was to deny Moore due process of law.

Moore, like Ruffalo, had no reason to suspect that in using the affidavit for impeachment he would irrevocably assure his disbarment on the basis of accusatory, derogatory, and highly prejudicial charges and complaints unrelated and extraneous to the State Bar's pleadings. Unlike Ruffalo, Moore was not given adequate opportunity to be heard in response to either the State Bar's original petition or the Taylor affidavit. *See Ruffalo, supra* at 1226; *Nebraska State Bar Ass'n v. Dineen*, 455 N.W.2d 178, 180 (Neb. 1990); *Com. On Pro. Ethics & Conduct v. Wenger*, 454 N.W.2d 367, 370 (Iowa 1990); *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 104, 83 S. Ct. 1175, 1180, 10 L. Ed. 2d 224, 230 (1963); and *Louisiana State Bar Association v. McGovern*, 481 So.2d 574, 591 (La. 1986). Moore has been denied a fair trial according to law.

SUMMARY AND CONCLUSION

The trial court, the Fourth Texas Court of Appeals, San Antonio, and the Supreme Court of Texas allowed Moore to be disbarred for violations with which he was not charged, without affording him opportunity to be heard in response either to the original charge in the State Bar's pleadings or the subsequent charges in the Taylor affidavit. The constitutional right implicated here is basic:

> No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, ... are among the constitutional rights of every accused ...

Cole v. Arkansas, 333 U.S. 196, 201, 68 S. Ct. 514, 517, 92 L. Ed. 644 (1948); *Olsen v. McFaul*, 843 F.2d 918, 930 (6th Cir. 1988); *Watson v. Jago*, 558 F.2d 330, 338 (6th Cir. 1977). The trial court allowed additional "charges," in the form of the Taylor affidavit, to be leveled against Moore after trial commenced while refusing to allow him to be heard on those charges or on the State Bar's claim that Moore acted fraudulently by securing the loans and "walking away." The damaging statements contained in the affidavit were wholly unrelated to the limited portion of the affidavit used to impeach Taylor. Moore had no opportunity to prepare for or defend the charges, since their improper admission could not have been foreseen. Admission of the affidavit was obviously highly prejudicial, as is evidenced by jurors' affidavits obtained after the trial. The Taylor affidavit was read during the jury's deliberations and played a major part in the jury's determination. Clearly, Moore has been denied due process, and the case should be reversed and a new trial should be granted.

For the foregoing reasons, it is respectfully requested that this Court issue a Writ of Certiorari.

Respectfully submitted,

JACK N. PRICE
State Bar No. 16293000
410 Congress Avenue
Second Floor
Austin, Texas 78701
(512) 474-1563
FAX (512) 474-4727

ATTORNEY FOR PETITIONER

APPENDIX

No. 17,508

THE STATE BAR OF TEXAS	)IN THE DISTRICT COURT)
	)OF VAL VERDE
V.	)COUNTY, TEXAS
ROBERT ALLEN MOORE	)63RD JUDICIAL DISTRICT

JUDGMENT

On the 20th day of February, 1990, the above-styled and numbered cause was called for trial. The Petitioner, the Grievance Committee for State Bar District Number 17B, State Bar of Texas, appeared by and through its attorney of record, and the Respondent, Robert Allen Moore, appeared in person and by and through his attorney of record. The parties announced ready for trial, and a jury having been demanded, a jury was thereafter selected and duly sworn and said cause proceeded to trial.

On the 23rd day of February, 1990, the jury, through its foreman, announced in open court that a verdict had been reached. Whereupon, the Court received the jury's verdict, which was and is incorporated herein by reference and made a part hereof for all purposes, and which was signed by the jury foreman, indicating a unanimous verdict.

On the 30th day of March, 1990, the Court heard evidence and argument by both parties on the question of what the appropriate sanction would be.

The Court, based upon the jury's verdict and the law applicable thereto, is of the opinion and so finds that the acts

and conduct on the part of the Respondent, as found by the jury in answer to Question No. 1, constitute a violation of Disciplinary Rule 1-102(A)(4) of the Code of Professional Responsibility and a violation of Art. X, Section 7, State Bar Rules. As to such act of misconduct, the Court finds that the appropriate discipline is disbarment from the practice of law and ORDERS that from the date this Judgment is signed, Respondent be and is disbarred.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Respondent, Robert Allen Moore, be and is hereby DISBARRED as an attorney in the State of Texas, and that he shall hereafter exercise none of the privileges and prerogatives of an attorney of law.

It is further ORDERED that Respondent, Robert Allen Moore, is hereby permanently enjoined from practicing law in Texas, holding himself out as an attorney at law, performing any legal services for others, accepting any fee directly or indirectly for legal services, appearing as counsel or in any other representative capacity in any proceeding in any Texas Court or before any Texas administrative body, or holding himself out to others or using his name, in any manner, in conjunction with the words, "attorney at law," "counselor at law," or "lawyer."

It is further ORDERED that Respondent, Robert Allen Moore, on or before thirty (30) days from the date this Judgment is signed, notify each of his current clients of his inability to continue to represent such client and of the necessity of obtaining other counsel. Further, Respondent, Robert Allen Moore, is ORDERED, within thirty (30) days from the date this Judgment is signed, to deliver all papers, files, or other property belonging to Respondent's clients,

refund to clients any unearned fees paid in advance, and file an affidavit with the Clerk of the Court, sending a copy to the General Counsel's Office of the State Bar of Texas, showing compliance therewith, or if compliance was not possible, showing with particularity as to individual client(s) what effort was made to comply.

It is further ORDERED that on or before ten (10) days following the date this Judgment is signed, Respondent, Robert Allen Moore, surrender his Texas law license and permanent bar card to the Clerk of the Supreme Court of Texas.

It is further ORDERED that the Clerk of the Court shall forward a certified copy of the Third Amended Disciplinary Petitioner, along with a copy of this Judgment to each the Clerk of the Supreme Court of Texas, Supreme Court Building, Austin, Texas 78711, and to the General Counsel of the State Bar of Texas, P. O. Box 12487, Austin, Texas 78711.

It is further ORDERED that all costs of court herein incurred shall be taxed against the Respondent, Robert Allen Moore, for which the Clerk shall have execution if they are not timely paid.

SIGNED this _____ day of MAR 30 1990, 1990.

/s/
JUDGE PRESIDING

APPROVED AS TO FORM:

Dawn Miller	James P. Boldrick
Attorney for Petitioner	Attorney for Respondent

COURT OF APPEALS
FOURTH COURT OF APPEALS DISTRICT OF TEXAS
SAN ANTONIO

OPINION

Appeal No. 04-90-00424-CV

Robert Allen MOORE,
Appellant

v.

THE STATE BAR OF TEXAS,
Appellee

Appeal from the 63rd District Court of Val Verde County
Trial Court No. 17,508
Honorable Curt F. Steib, Judge Presiding

Opinion by: Orlando Garcia, Justice

Sitting: Shirley W. Butts, Justice
David Peeples, Justice
Orlando Garcia, Justice

Delivered and Filed: October 30, 1991
(STAMPED 1 NOV 1991)

AFFIRMED

Appellant, Robert Allen Moore, an attorney, appeals from a disciplinary proceeding instigated by appellee, the State Bar of Texas. Appellant was charged with engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. *See Supreme Court of Texas Code of*

Professional Responsibility, DR 1-104 (1988). The basis of the State Bar's complaint stems from Mr. Moore's conduct in securing two substantial loans from two sisters, Mary and Blanche Taylor, whose nephew, Mark Taylor, worked in Mr. Moore's law firm. Mr. Taylor retained Mr. Moore to handle the estate of Mr. Taylor's father. Mr. Moore, who was in serious financial trouble, learned that Mr. Taylor's aunts, the Taylor sisters, were wealthy. Mr. Moore sought the help from Mr. Taylor in procuring loans from the Taylor sisters. The sisters loaned him monies in excess of $900,000. The State Bar contends that Mr. Moore told the Taylor sisters that he could no longer work on Mr. Taylor's case involving the probate matter without these loans and that he would repay the loans with income from cases he would settle or generate substantial fees. A jury found Mr. Moore had engaged in the conduct alleged by the State Bar, and the trial judge entered an order disbarring him from the practice of law. Mr. Moore alleges several errors. We affirm.

Appellant first complains that the trial court erred in allowing an affidavit by Mark Taylor into evidence. Appellant's trial counsel asked Mr. Taylor if he had ever made the following statement under oath:

> ... To a degree Richard [a law associate of Moore's] felt a professional responsibility to Mr. Moore, insofar as *Mr. Moore was not breaching any legal or ethical duties to myself or my aunts.*

(Emphasis added). This statement is contained in a five page affidavit signed by Mr. Taylor which formed the basis of the State Bar complaint. During the course of trial, appellee, the State Bar, sought to introduce the entire affidavit under rule 106 of the Texas Rules of Civil Evidence, which states:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may at that time introduce any other part of any other writing or recorded statement which ought in fairness to be considered contemporaneously with it. "Writing or recorded statement" includes depositions.

Appellant objected to the affidavit being introduced as evidence. At trial appellant's counsel made the following objection:

> Your Honor, objection was made to the offer of that [affidavit] in that it violates several of the Rules of Evidence, including bolstering. It is inadmissible from the standpoint of there is no purpose; it covers matters beyond the scope of this trial. If there is any element of that that would be used for completeness of the statement, then it would be the idea of the completeness of the statement, and if any of those are made we would certainly listen to those as being part of the idea that --

Apparently, trial counsel sought to exclude parts or all of the affidavit. Appellant sought to read part of the affidavit showing that appellant had not violated any legal or ethical duties to Mr. Taylor of his aunts. Thereafter, the State Bar sought to introduce the entire affidavit which contained descriptions of other allegations of misconduct. Appellant intended to withhold the affidavit or at least parts of the affidavit that he deemed either harmful or irrelevant. Rule 105 of the Texas Rules of Civil Evidence provides the

following:

> (a) When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly; but, in the absence of such request the court's action in admitting such evidence without limitation shall not be a ground for complaint on appeal.
>
> (b) When evidence referred to in paragraph (a) above is excluded, such exclusion shall not be a ground for complaint on appeal unless the proponent expressly offers the evidence for its limited, admissible purpose or limits its offer to the party against whom it is admissible.

Appellant did not make a specific request to disallow parts of the affidavit. Thus, we overrule his first point of error.

Next, appellant complains that the trial court erred in allowing evidence, inferences, and statements pertaining to alleged wrongdoing by appellant which were not a part of the State Bar's pleadings and were not the basis for disbarment. Again, appellant complains about the admission of the Taylor affidavit, which we have ruled was properly admitted. Moreover, appellant complains that the evidence submitted at trial was at variance from the pleadings and that the State Bar can only recover under the pleadings; and that the State Bar can recover on the facts different than those asserted in its pleadings only if there had been a consent to trial of

issues outside pleadings. Both parties cite *Brown v. American Transfer and Storage Co.*, 601 S.W.2d 931, (Tex. 1980), as a basis for their positions. First, the State Bar specifically pleaded that appellant had engaged in conduct contrary to the disciplinary rules, in particular DR 1-102(A)(4), which states: "A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

There can be no question that the State Bar recovered only upon the ground which it pleaded. The only question submitted to the jury was: "From a preponderance of the evidence did the Respondent, ROBERT ALLEN MOORE, in his dealings with MARY TAYLOR and/or BLANCHE TAYLOR engage in conduct involving dishonesty, fraud, deceit, or misrepresentation?" Thus, we overrule appellant's point of error.

Appellant also contends that the trial court erred in disallowing evidence relating to appellant's repayment of some of the monies borrowed from the Taylor sisters. Appellant did not file any special exceptions to the State Bar's pleadings relating to the loan transaction between appellant and the Taylor sisters. The trial court had granted the State Bar's motion in limine regarding the exclusion of the evidence pertinent to this point of error. Appellant must show that the trial court's ruling was in error and that the error was calculated to cause and did probably did cause rendition of an improper judgment. *Booth v. Hausler*, 766 S.W.2d 788, 789 (Tex. 1989); Tex. R. App. P. 81(b). Reversible error will not usually occur in connection with rulings on questions of evidence "unless [appellant can demonstrate that] the whole case turns on the particular evidence admitted or excluded." *Atlantic Mut. Ins. Co. v. Middleman*, 661 S.W.2d 182, 185 (Tex. App. -- San Antonio

1983, writ ref'd n.r.e.). Appellant fails to show how the exclusion of this evidence would have or might have affected the jury's verdict. Thus, we overrule appellant's point of error.

Next, appellant contends that the trial court made three errors in the jury charge. The trial court submitted a single question to the jury, which read as follows:

> From a preponderance of the evidence did the Respondent, ROBERT ALLEN MOORE, in this dealings with MARY TAYLOR and/or BLANCHE TAYLOR engage in conduct involving dishonesty, fraud, deceit, or misrepresentation?
>
> In answering this Question consider only dealings, if any, between Robert Allen Moore and Mary Taylor and/or Blanche Taylor on or before December 1, 1983.

Appellant contends that the court erred in failing to define the term "deceit." If the trial court omits a question, definition or instruction relied upon by the complaining party, only a request for the submission of the omitted matter preserves error. *See* Tex. R. Civ. P. 278 and 279. The function of definitions and instructions int he charge is to assist the jury in answering questions submitted. *Union Oil Co. v. Richard*, 536 S.W.2d 955, 957 (Tex. Civ. App. -- Beaumont 1976, writ ref'd n.r.e.). The trial court has considerably more discretion when submitting instructions and definitions to the jury than it has in submitting jury questions. *See Houston Nat'l Bank v. Biber*, 613 S.W.2d 771, 775 (Tex. Civ. App. -- Houston [14th Dist.] 1981, writ ref'd n.r.e.).

In appellant's proposed charge, the term "deceit" was defined as follows:

> DECEIT means a concealment or false suggestion made by an attorney in his professional capacity, or in the course of his professional employment, to mislead or deceive an opposing party into taking actions which are injurious or damaging to the opposing party. *Committee on Professional Ethics and Conduct of Iowa State Bar Ass'n v. Hurd*, 325 N.W.2d 386, 389 (Ia. 1982).

The trial court's failure to submit a definition for the term "deceit" shall not be a ground for reversal of judgment unless that definition is tendered in substantially correct wording. *See* Tex. R. Civ. P. 278. In *Minnick v. State Bar of Texas*, 790 S.W.2d 87, 91 (Tex. App. -- Austin 1990, writ denied), the court specifically held that a violation of DR 1-102 (A)(4) does not require the conduct to occur in the lawyer's professional capacity. Thus, appellant's proposed definition of "deceit" was not in substantially correct form. The trial court made no error in failing to submit appellant's proposed definition.

Next, appellant contends that the trial court submitted improper definitions for the words "fraud" and "misrepresentation" and that the term "dishonesty" was not defined or included in the jury charge. From the record, appellant made the following comment to the court concerning these terms:

> With regard to the terms misrepresentation, fraud, they are two of the four words used in the descriptions of types of

> conduct, and without definitions for the other two words, dishonesty and/or deceit, that the court is committing error in that it is emphasizing two of the four elements when the same is erroneous.

A party objecting to a charge must point out distinctly the objectionable matter and the grounds of the objection. Tex. R. Civ. P. 274. The purpose of the objection is to permit the court to recognize and correct errors in the charge before it is submitted. "An objection that does not meet both requirements is properly overruled and does not preserve error on appeal." *Castleberry v. Branscum*, 721 S.W.2d 270, 276 (Tex. 1986). In *Castleberry*, the supreme court specifically noted that the rule requires objections "both to clearly designate the error and to explain the grounds for the complaint." *Castleberry* 721 S.W.2d at 276. We note that appellant did not clearly state his objections to the terms "fraud" and "misrepresentation." Moreover, appellant did not request that the term "dishonesty" be defined, and the complainant therefore has been waived pursuant to the rule.

Appellant further waived any complaint regarding the sole question submitted as we are not referred to any part of the record disclosing his objection to the question. Appellant has waived any complaint regarding his proposed question on whether or not the Taylor sisters relied on any representations made by the appellant. No authority or legal argument is presented under this particular complaint. Tex. R. App. P. 74(d). Thus, we overrule appellant's points of error concerning the jury charge.

Next, appellant complains of the sufficiency of the evidence to sustain the jury verdict. In reviewing an insufficiency of the evidence challenge, the court of appeals must first consider, weigh, and examine all of the evidence

which supports and which is contrary to the jury's determination. After its review, the court should set aside the verdict only if the evidence standing alone is too weak to support the finding, or the answer is so against the overwhelming weight of the evidence that it is manifestly unjust and clearly wrong. *Herbert v. Herbert*, 754 S.W.2d 141, 144 (Tex. 1988); *Sosa v. City of Balch Springs*, 772 S.W.2d 71, 72 (Tex. 1989); *Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex. 1965). In considering a no evidence point of error, the appellant court must only consider the evidence and inferences tending to support the finding and disregard all evidence and inferences to the contrary. *Davis v. City of San Antonio*, 752 S.W.2d 518, 552 (Tex. 1988); *Aluminum Co. of America*, 717 S.W.2d 588, 593 (Tex. 1986).

Appellant maintains that the State Bar had to prove all the necessary elements to sustain an actionable fraud cause of action. We disagree. The jury could have found a violation of the disciplinary rule which consisted of dishonesty, fraud, misrepresentation, or deceit. *See* DR 1-102(A)(4). A review of the evidence establishes the following facts: witnesses for both sides testified that appellant was in financial trouble and that he was under considerable pressure to obtain and secure additional funding for his law practice. Appellant sought to obtain the monies from other banks, but was unsuccessful. He, thereafter, persuaded the Taylor sisters that, unless he was able to borrow the sums of monies needed, he would be unable to complete the work on Mark Taylor's dad's estate case. Appellant convinced the Taylor sisters that he could easily repay the monies from his existing caseload of personal injury cases. Although he knew he could not ensure the amounts of recovery from these cases, he represented to the Taylor sisters he would settle some cases and that repayment of the borrowed monies were assured. Appellant maintains

that expressions of opinion are not actionable fraud. However, the State Bar only needed to establish any one of the elements contained within DR 1-102(A)(4). We find that the evidence is sufficient to sustain the jury's verdict, and that the verdict is not so against the overwhelming weight of the evidence that it is manifestly unjust and clearly wrong. Appellant's points of error challenging the factual and legal sufficiency of the evidence are overruled.

Next, Appellant contends that the trial judge made an improper comment on the evidence or the weight that it should be given to the jury. Appellant complains that the trial judge erred in giving the jury the following instruction during the course of the trial:

> Ladies and Gentlemen, I'm going to instruct you that the law of this state is that a lien on the homestead can be given for the purchase price, improvements, and payment of taxes. Otherwise, the lien is not valid. Thank you. Go ahead.

Moore argues that this statement by the trial judge was an improper comment on the evidence. First, the comment does not relate to any material fact or issue in dispute. *Linden-Almark Inc. v. McDonald*, 745 S.W.2d 82, 85 (Tex. App. -- Fort Worth 1988, writ denied); Tex. R. Civ. P. 277. Only a direct comment on the weight of the evidence presents reversible error. *See Briseno v. Martin*, 561 S.W.2d 794, 796-97 (Tex. 1977); *Linden-Almark*, 745 S.W.2d at 85. And a direct comment on the weight of the evidence is one which suggests to the jury the trial judge's opinion concerning the matter about which the jury is asked. *See City of Amarillo v. Langley*, 651 S.W.2d 906, 915 (Tex. App. -- Amarillo 1983, no writ). Moreover, an instruction which is a correct

statement of the law will not serve as a basis to reverse the jury's verdict. *See Isbell v. Williams*, 738 S.W.2d 20, 24 (Tex. App. -- Texarkana 1987, writ ref'd n.r.e.). Appellant failed to object to the statement complained of or request that the jury be instructed to disregard the statement and thereby, waived appellate review. Appellant contends that an instruction to disregard would not have cured the prejudicial nature of the comment. We are unpersuaded that the comment relating to the law on homestead liens was injurious to the appellant. We therefore overrule appellant's point of error.

Finally, appellant contends that the appellate court should reverse the case on the doctrine of cumulative error due to the many accumulated errors at trial. We have reviewed the record and studied each claimed error individually. We have found no reversible trial error in our review and assessment, and thus, we overrule appellant's contention of cumulative error.

We affirm the judgment of the trial court.

ORLANDO GARCIA,

Justice

DO NOT PUBLISH

COURT OF APPEALS
FOURTH COURT OF APPEALS DISTRICT OF TEXAS
SAN ANTONIO

JUDGMENT

Appeal No. 04-90-00424-CV

Robert Allen MOORE,
Appellant

v.

THE STATE BAR OF TEXAS,
Appellee

Appeal from the 63rd District Court of Val Verde County
Trial Court No. 17,508
Honorable Curt F. Steib, Judge Presiding

BEFORE JUSTICES BUTTS, PEEPLES AND GARCIA

JUDGMENT

In accordance with this Court's opinion of this date, the judgment of the trial court is AFFIRMED. It is ORDERED that appellee, The State Bar of Texas, recover costs of this appeal from appellant, Robert Allen Moore, and from attorney for appellant, Jack N. Price, as surety on appellant's cost bond.

SIGNED October 30, 1991.

_____
ORLANDO GARCIA
JUSTICE

COURT OF APPEALS
FOURTH COURT OF APPEALS DISTRICT
300 DOLOROSA, SUITE 3200
BEXAR COUNTY CRIMINAL JUSTICE CENTER
SAN ANTONIO, TEXAS 78205
HERB SCHAEFER, CLERK

December 2, 1991
(STAMPED 3 DEC 1991)

Jack N. Price
JACK N. PRICE, P.C.
410 Congress Avenue - Second Floor
Austin, TX 78701

Linda Acevedo
Assistant General Counsel
Office of General Counsel
P.O. Box 12487, Capitol Station
Austin, TX 78711

RE: Case N;o. 04-90-00424-CV
Trial Court No. 17,508

Style: Robert Allen Moore
v. The State Bar of Texas

Dear Counsel:

After examination of the record in the above styled and numbered cause the Court **DENIES** Appellant's Motion for Rehearing.

ORDERED the day and year first above written.

Very truly yours,

HERB SCHAEFER, CLERK

_____

DIANA T. GARCIA, DEPUTY CLERK

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

March 11. 1992

Mr. Jack N. Price (STAMPED 12 MARCH 1992)
410 Congress Avenue
Second Floor
Austin, TX 78701

Mr. Jim McCormack
General Counsel
State Bar of Texas
Austin, TX 78711

Ms. Linda A. Acevedo
Assistant General Counsel
State Bar of Texas
P. O. Box 12487
Austin, TX. 78711

RE: Case N:o. D-1965

Style: ROBERT ALLEN MOORE v. THE STATE BAR OF TEXAS

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation,

"Writ Denied."

Sincerely,

JOHN T. ADAMS, Clerk
by_____
Courtland Crocker, Deputy

THE SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

May 6, 1992

Mr. Jack N. Price (STAMPED 7 MAY 1992)
410 Congress Avenue
Second Floor
Austin, TX 78701

Mr. Jim McCormack
General Counsel
State Bar of Texas
Austin, TX 78711

Ms. Linda A. Acevedo
Assistant General Counsel
State Bar of Texas
P. O. Box 12487
Austin, TX 78711

RE: Case No. D-1965

Style: ROBERT ALLEN MOORE v. THE STATE BAR OF TEXAS

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ

of error in the above styled case.

Sincerely,

JOHN T. ADAMS, Clerk

by _____
Courtland Crocker, Deputy

COURT OF APPEALS
FOURTH COURT OF APPEALS DISTRICT
300 DOLOROSA, SUITE 3200
BEXAR COUNTY CRIMINAL JUSTICE CENTER
SAN ANTONIO, TEXAS 78205

June 5, 1992

Jack N. Price
JACK N. PRICE, P.C.
410 Congress Avenue - Second Floor
Austin, TX 78701

Linda Acevedo
Assistant General Counsel
Office of General Counsel
P. O. Box 12487, Capitol Station
Austin, TX 78711

RE: Case No. 04-90-00424-CV
Trial Court :No. 17,508

Style: Robert Allen Moore
v. The State Bar of Texas

Dear Counsel:

The Court has this date issued the Mandate in the above styled and numbered cause.

Very Truly Yours,

HERB SCHAEFER, CLERK

_____

Cynthia A. Martinez, Deputy

Supreme Court, U.S.
FILED
SEP 1 1992
OFFICE OF THE CLERK

No. 92-240

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

ROBERT ALLEN MOORE
PETITIONER

V.

THE STATE BAR OF TEXAS
RESPONDENT

On Writ of Certiorari
To The
Supreme Court of Texas

BRIEF OF RESPONDENT

Respectfully submitted,

Dawn Miller
Senior Assistant
General Counsel

State Bar of Texas
Office of General Counsel
State Bar of Texas
P.O. Box 12487
Austin, Texas 78711
512/463-1381

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STATEMENT OF THE CASE

In or about February 1982, Mark Taylor ("Taylor"), retained as his attorney Robert Allen Moore ("Moore") to represent him in a probate proceeding concerning Taylor's father's estate. (S.F. 40, 41-42, 243-245). While that matter was pending, Moore employed Taylor to work as a paralegal in his law office. (S.F. 40, 45, 247). Through his employment, Taylor and Moore became friends to the extent that they socialized together outside the office. (S.F. 248, 382).

In the spring of 1983, Moore began to suffer financial difficulties. (S.F. 35, 251-252; 384). At this time, Moore was a borrower on notes totalling $500,000

at Metro Bank and Moore admitted that if the bank were closed by the FDIC and the notes were called in, he would not have been able to repay them. (S.F. 35, 51). He felt a great amount of pressure to secure additional funding for his practice. (S.F. 52).

Moore learned that Taylor had two elderly aunts, Mary and Blanche Taylor, who were quite wealthy. (S.F. 253, 383). Moore asked Taylor to help him secure $100,000 and at Moore's suggestion Taylor approached his aunts for the loan. (S.F. 254). A loan for $100,000 was in fact obtained from Texas American Bank of Houston ("TAB") which was secured by a treasury bill in the name of Mary

Taylor and held by TAB as collateral (Pet. Ex. 1).

Metro Bank closed on July 28, 1983. (S.F. 97). When Moore learned of the closing, he told Taylor that he needed to find another bank because of the money he owed and that he would be unable to keep his law practice open unless he obtained monies to pay off his indebtedness at Metro. (S.F. 257). Moore and his accountant assembled a loan package that Taylor then delivered to several banks in order to attempt to secure further financing but to no avail. (S.F. 52; 258-259). Once again, Moore and Taylor contacted Mary and Blanche Taylor. Moore informed them he needed a much larger loan in order to pay off his

existing loans at Metro Bank. (S.F. 259). Thereafter, Moore, Taylor, and Richard Keen, an associate in Moore's office, met with the aunts in Houston. (S.F. 387). At this meeting, Moore brought with him a list of his pending personal injury cases which he had prepared in connection with the loan packages. (Pet. Ex. 2). He proceeded to explain to the aunts that without additional financing he would be unable to continue to work on their nephew's case, even though their nephew's case was probably worth between $50-75 million. (S.F. 392, 280). He assured them that there would be no problem repaying the loan because he had several settlements coming in and that he

had several large cases that would bring in a great amount of money. He presented them the list of his major cases and proceeded to assign each one of them a settlement value. (S.F. 260-263; 349, 387-391). He also assured them that there was no possibility of default because these cases were close to trial and were guaranteed to produce a substantial amount of money for the firm. He also assured them that they need not worry about bankruptcy because a professional corporation could not file for bankruptcy. (S.F. 392). Not once did Moore ever inquire as to whether the aunts had an attorney nor whether they had any knowledge, education or experience in personal injury law. (S.F. 392).

On the basis of these misrepresentations, Mary and Blanche Taylor assisted Moore in obtaining an additional $830,000, over and above the $100,000 loan secured by Mary Taylor's treasury bill, from TAB. This $930,000 loan, which was executed on August 8, 1983, was secured by two certificates of deposits (one valued at $498,000 and the other valued at $432,000) which were held by Mary and Blanche Taylor. (Pet. Ex. 3, 11, 12). He utilized the monies to absolve himself of the $500,000 Metro Bank debt, the original $100,000 note, and to pay off other debts including loans he owed to several individuals. (S.F. 154-155, 267-269). Subsequently, Moore again had

financial difficulties, including the overdrafting of the account into which the loan proceeds had been deposited, once as much as $10,000. (S.F. 269, 365). Moore convinced the aunts to refinance the entire loan at another Houston bank, First City National Bank of Houston. (S.F. 270, 444). The loan was in fact refinanced at First City National in the original principal sum of $1,000,000, secured again by the Taylors' certificates of deposit.

Thereafter, Moore defaulted on the note and the Taylor aunts' CD's were applied against the indebtedness. (S.F. 192).

The State Bar filed a disciplinary lawsuit against Moore alleging specific acts of

professional misconduct. (T. 377). The case was tried to a jury before the Honorable Curt F. Steib. The sole question presented to the jury was whether Moore had engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in his dealings with the Taylor aunts. (T. 409). The jury returned the answer in the affirmative and at a separate hearing on punishment the court entered the sanction of disbarment against Moore.

Moore filed a motion for new trial and an amended motion for new trial. No hearing was held on either motion. The amended motion for new trial was overruled by operation of law. The affidavits of jurors referred to in Moore's

Petition for Writ of Certiorari (Page 9) were not attached to either motion and were never offered into evidence. Moore is, therefore, inaccurate in asserting that the trial court "refused to allow them to be filed." (See Footnote 2, Page 9, Petition for Writ of Certiorari.)

The Court of Appeals affirmed the judgment of the trial court. The Supreme Court of Texas denied Moore's Application for Writ of Error and Moore's Motion for Rehearing of the Application for Writ of Error.

OBJECTION TO JURISDICTION

The Petition for Writ of Certiorari should be denied as Petitioner, Robert Allen Moore (hereinafter called "Moore"), has

failed to establish jurisdiction in accordance with either Rule 10.1(a) or 10.1(b) of the Rules of the Supreme Court of the United States. No federal question was decided by the state court of last resort. The Court of Appeals opinion, set forth beginning on Page 4a of the Appendix to Moore's Petition for Writ of Certiorari, which opinion was affirmed by the Supreme Court of Texas's denial of Moore's application for writ of error, does not address any due process arguments now being asserted by Moore. Rather the points of error involve evidentiary points, the propriety of an instruction given the jury by the judge, and the wording of the jury charge. Moore

asserts due process arguments for the first time in his Motion for Rehearing of the Application for Writ of Error, which was denied by the Supreme Court of Texas on May 6, 1992 (See Page 20a of Appendix to Moore's Petition for Writ of Certiorari.). No new opinion was rendered with the denial of the Motion for Rehearing.

ARGUMENT AND AUTHORITIES

Moore contends that his due process rights were violated because an affidavit which came into evidence constituted new charges against him about which he did not have notice and opportunity to be heard.

In fact, Moore himself first attempted to introduce a portion of

the affidavit during cross-examination of a witness. The affidavit came into evidence in its entirety under Rule 106 of the Texas Rules of Civil Evidence. (See Appendix 1a for text of Rule.) The Supreme Court of Texas, in denying Moore's application for writ of error, found no error in its introduction.

Moore asserts that the introduction of the remainder of the affidavit constituted new charges of which he didn't have notice and about which he did not have an opportunity to be heard.

The affidavit did not constitute "new charges". No trial amendment was sought or granted amending the State Bar's pleading to include

material contained solely in the affidavit. No issue went to the jury which addressed matters "raised" solely in the affidavit. No recitation is found in the judgment which pertains to matters contained solely in the affidavit.

Absent a trial amendment, a jury issue, or a finding in the judgment, it is difficult to see how material contained in an affidavit which properly came into evidence can constitute new charges about which Moore lacked notice and an opportunity to be heard.

None of the cases which Moore cites for the proposition that his due process rights were violated by virtue of introduction of the affidavit stands for the proposition

that introduction of a document alone under such circumstances constitutes a violation of due process.

In In Re Ruffalo, 390 U.S. 544, 88 S. Ct. 122, 20 L. Ed. 2d 177 (1968), for example, the disbarred lawyer argued successfully that his procedural due process rights were denied because the Ohio Board of Commissioners on Grievances and Discipline, after hearing the testimony of both the attorney and another witness, amended its pleading to add an additional charge. This new charge was ultimately one of two charges upon which Ruffalo was disbarred.

In the case at bar, introduction of the affidavit did not constitute

an amendment of the State Bar's pleading.

Similarly, Louisiana State Bar Ass'n v. McGovern, 481 So. 2d 574 (La. 1986), is distinguishable. In that case, a commissioner of the Committee on Professional Responsibility, after hearing evidence relating to certain charges, made recommendations of findings which included violations of rules not pled in the petition. The Supreme Court of Louisiana, charged with reviewing the record of evidence taken, deciding whether misconduct has occurred and what sanction, if any, is appropriate, chose not to consider those violations not contained in the original pleading.

Moore's trial did not result in a finding of rule violations not pled in the petition.

In Louisiana State Bar Ass'n v. Boddie, 534 So. 2d 994 (La. 1988), the court refused to address possible violations of disciplinary rules which had not been pled.

Again, in the case at bar, no new rules violations were pled as a result of the introduction of the affidavit.

The Arizona Supreme Court rejected bar counsel's argument that a lawyer should be disciplined for rules not pled in Matter of Myers, 795 P.2d 201 (Ariz. 1990).

No such argument was made in the instant case.

In another case cited by Moore, the Louisiana Supreme Court in fact rejected a due process argument that a lawyer could not be disciplined for rules not pled, surmising that the rules not pled were in the nature of lesser included offenses to the rules pled. Louisiana State Bar Ass'n v. Keys, 567 So. 2d 588, 591 (La. 1990).

Again, there is no variance between what was pled in the Moore case and what finding was made by the court as a result of the jury's verdict.

Moreover, one of the cases cited by Moore in fact supports the notion that due process was not violated by the introduction of an affidavit into the record.

In Matter of Peterson, 439 N.W. 2d 165 (Iowa 1989), an applicant to take the Iowa Bar examination was denied the opportunity to do so after the Supreme Court of Iowa found that he lacked the requisite moral fitness. Its finding was premised in part upon the affidavit of a former girlfriend whom Peterson had been convicted of assaulting.

Peterson claimed his due process rights were violated by board of law examiners' consideration of the affidavit.

The Iowa Supreme Court disagreed, finding that Peterson had received adequate notice of the nature of the adverse information as he had had access to the materials and had in fact reviewed them prior

to the hearing. Matter of Peterson, 439 N.W. 2d 165, 170 (Iowa 1989).

As it was Moore who initially sought introduction into evidence of a portion of the affidavit, he clearly had prior notice of its existence and contents.

Moore's second argument is wholly without merit. Moore contends his due process rights were violated because he could not introduce evidence of repayment of monies to the Taylor aunts.

This is simply not true. Although a motion in limine was granted preventing Moore from bringing up efforts, if any, of repayment during the jury trial, Moore was given full latitude to put on any such evidence during the

separate hearing on the discipline to be imposed.

Under the State Bar Rules in effect at the time, a jury could make determination of the facts on the basis of which a court would determine as a matter of law whether or not a lawyer had engaged in acts of misconduct; but the court and the court alone could decide the discipline which the attorney was to receive for the misconduct. (See Page 2a of the Appendix for the text of Article X, Section 23, of the State Bar Rules, which was in effect at the time of trial.)

The court in its discretion could hold a separate evidentiary hearing relative to the issue of the appropriate sanction.

The trial court in the Moore case properly entered an order granting a motion in limine prohibiting the offer of any evidence of repayment without first seeking a ruling on admissibility. Whether or not any money was later repaid was irrelevant to what the circumstances were under which the money was taken initially. Such evidence could only be relevant as mitigatory in assessing what sanction should be imposed.

A separate evidentiary hearing was held in the Moore case. Moore had ample opportunity to put on any evidence of repayment he wished to present at that time.

It is, therefore, a misstatement for Moore to assert that he had no

opportunity to be heard on the issue of repayment.

Moore further asserts that the prejudicial effect of disallowing evidence of repayment was exacerbated by the court's allowing evidence to be presented regarding default on the loan. The facts regarding default were pled by the State Bar of Texas. (See Page 6a of Appendix for Third Amended Disciplinary Petition filed by the State Bar of Texas, [S.F. 377-382.].) No special exceptions to this portion of the pleading were made. Nothing was improper in offering and having admitted evidence to support those allegations.

SUMMARY AND CONCLUSION

Moore has failed to properly invoke jurisdiction of this Honorable Court as no federal question was decided by a state court of last resort.

Moore failed to even assert any due process arguments until after the court of appeals rendered its opinion and the Supreme Court of Texas denied application for writ of error, thereby affirming the court of appeals' opinion.

Moore's procedural due process rights were not violated by the introduction into evidence of an affidavit under Rule 106 of the Texas Rules of Civil Evidence. No trial amendment resulted from the introduction of such evidence and no

jury issues or legal findings by the court flowed from the introduction of such evidence.

Moore's procedural due process rights were not violated by the disallowance of introduction of evidence of repayment in the jury trial portion of the proceeding as such evidence was properly excluded as irrelevant and Moore had the opportunity in any event to introduce such evidence at the separate hearing on the sanction to be imposed.

PRAYER

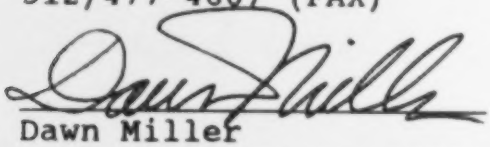
WHEREFORE, PREMISES, ARGUMENTS AND AUTHORITIES CONSIDERED, Respondent prays that Petitioner's Petition for Writ of Certiorari be denied and for such other and

further relief as this Court may deem proper.

Respectfully submitted,

Dawn Miller
Senior Assistant
General Counsel

State Bar of Texas
Office of the General
Counsel
P.O. Box 12487
Austin, Texas 78711
512/463-1381
512/477-4607 (FAX)



Dawn Miller
State Bar Card No. 15561900

ATTORNEY FOR RESPONDENT

APPENDIX

RULE 106. REMAINDER OF OR RELATED WRITINGS OR RECORDED STATEMENTS.

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may at that time introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it. "Writing or recorded statement" includes depositions.

ARTICLE X, SECTION 23. JUDGMENT

(A) Determinaton of Misconduct; Sanctions Available. If the court finds from the evidence in a case tried without a jury, or from the verdict of the jury, if there be one, that the respondent's conduct does not constitute professional misconduct, the court shall enter judgment accordingly. If the court shall find that the respondent's conduct does constitute professional misconduct, the court shall determine whether the respondent shall be reprimanded or suspended from practice (in which case the court shall fix the term of suspension not to exceed three (3) years for each separate act of misconduct) or disbarred and the court shall enter a judgment accordingly. If the judgment be one finding that the respondent's conduct constitutes professional misconduct, the court shall direct transmittal of certified copies of the judgment and disciplinary petition to the clerk, and the latter shall make proper notation on the membership rolls.

(B) Sanctions; Relevant Factors. In its discretion, the court may conduct a separate

evidentiary hearing on the appropriate measure of discipline. In determining the appropriate measure of discipline, the trial court shall consider, in addition to any other relevant matters, the nature and degree of misconduct for which the respondent is being disciplined, the seriousness and circumstances attending the misconduct, assurance that those who seek legal services will be insulated from unprofessional conduct, the profit to the attorney or the injury or hardship to others resulting from the misconduct, avoidance of repetition, the deterrent effect upon others, the maintenance of respect for the honor and dignity of the legal profession, and the conduct of the respondent during the course of the investigation and trial of the disciplinary action. In addition thereto, the disciplinary record of the respondent is admissible on the issue of the appropriate measure of discipline to be imposed.

(C) Terms of Judgment; Enforcement. In any judgment of disbarment or in any judgment of suspension for a period of more than ninety (90) days, the court shall order the respondent to

surrender his or her permanent bar card and law license for transmittal to the clerk. In all judgments of disbarment or suspension, the court shall direct that the respondent shall not practice law or represent himself or herself to be an attorney during the period of such disbarment or suspension. The violation of the court's judgment in this regard shall be punishable as for contempt. In all judgments of disbarment, suspension or reprimand, the court may make and enter all such other and further orders as the protection of the public and the respondent's clients may require, including probation of a suspension or a reprimand. In no event shall a court grant a member probation of a suspension or reprimand more than one time.

(D) Restitution. In all cases in which the proof establishes that the respondent's misconduct involved misapplication of client funds and the court determines that suspension is the appropriate measure of discipline, the judgment shall require that restitution be made during the term of suspension and shall provide that failure to do so shall cause the suspension to remain in effect

indefinitely thereafter and until evidence of satisfactory restitution is made by the respondent and is appropriately verified by counsel.

No. 17,508

STATE BAR OF TEXAS	§	DISTRICT COURT
	§	
	§	OF VAL VERDE
	§	
V.	§	COUNTY, TEXAS
	§	
	§	63RD JUDICIAL
	§	
ROBERT ALLEN MOORE	§	DISTRICT

THIRD AMENDED DISCIPLINARY PETITION

Petitioner, the Grievance Committee for State Bar District Number 17B, State Bar of Texas, files this its Third Amended Disciplinary Petition, complaining of Respondent, Robert Allen Moore, showing the Court:

I.

Petitioner brings this disciplinary action pursuant to the State Bar Act, Tex. Rev. Civ. Stat. Ann. art. 320a-1 (1979) and the

State Bar Rules. The acts and conduct of Respondent, as hereinafter described, constitute professional misconduct under the State Bar Rules art. X, §7.

II.

Respondent is an attorney licensed to practice law in Texas and a member of the State Bar of Texas. Respondent is a resident of Ector County, Texas. No service of citation is necessary for the reason that Respondent has answered herein.

FIRST CAUSE OF ACTION

III.

In or around the spring of 1983, Mark Taylor (hereinafter called "Taylor"), an employee and client of Respondent's, was approached by Respondent to see if Taylor could

obtain a line of credit for Respondent's professional corporation to refinance money Respondent's professional corporation had borrowed from Metro Bank. As a result of Respondent's attorney-client relationship with Taylor in representing Taylor's interests in the probation of Taylor's father's estate, Respondent was aware that Taylor had two great aunts, Mary Taylor and Blanche Taylor (hereinafter called the "Taylor aunts"), who would be financially capable of either loaning Respondent's professional corporation funds sufficeint to refinance the Metro Bank loan or fully collateralizing such a loan.

At Respondent's request, Taylor approached the Taylor aunts about utilizing one or more of their certificates of deposits as collateral for a One Hundred Thousand and no/100 ($100,000.00) Dollar loan. Respondent represented that he would be able to pay off the loan, thereby releasing the collateral, with a loan from Metro Bank. Respondent further represented that, if he were unable to secure the loan, he would have to withdraw from representation of Taylor. Based upon said representations, the Taylors put up a Four Hundred Ninety-Eight Thousand and no/100 ($498,000.00) Dollar Certificate of Deposit as collateral

for a One Hundred Thousand and no/100 ($100,000.00) Dollar note dated on or about July 25, 1983, made by Moore & Associates, P.C., payable to the order of Texas American Bank/Houston N.A.

III.

Thereafter, Respondent again sought Taylor's help in approaching the Taylor aunts regarding the utilization of the Taylor aunts' certificates of deposit as collateral for a Nine Hundred Thirty Thousand and no/100 ($930,000.00) Dollar loan with Texas American Bank/Houston N.A., One Hundred Thousand and no/100 ($100,000.00) Dollars of which represented a renewal of the principal due on the

One Hundred Thousand and no/100 ($100,000.00) Dollar loan as Respondent was not able to secure a loan at Metro Bank.

IV.

Subsequently, Respondent met with the Taylor aunts and induced them to utilize their certificates of deposit as collateral for such Nine Hundred Thirty Thousand and no/100 ($930,000.00) Dollar loan by representing them, among other things: (1) that if the loan were not made, Respondent would have to withdraw from representing Taylor because of his financial difficulties in continuing operation of his law firm and that said case would thereby be jeopardized; (2) a

settlement and/or trial value of a number of Respondent's personal injury cases; and (3) that settlement funds sufficient to cover the pay off of the loan would be received prior to maturity of the loan. In truth and in fact, Moore had not received firm settlement offers in any of the cases regarding which he represented settlement values to the Taylor aunts. Moreover, any settlement or trial value Respondent might have placed on a given case would have been purely speculative on his part; therefore the communication of any value to the Taylor aunts on a given case would have been misleading if he intended such valuation to induce

the Taylor aunts to collateralize his loan, which he did. Moore thereby fraudulently induced the Taylor aunts to collateralize his loan. But for the misrepresentations made by Respondent to the Taylor aunts, the Taylor aunts would not have agreed to the utilization of their certificates of deposit as collateral for the loans to Respondent's professional corporation. Such acts and omissions of Respondent as are described in this paragraph are violative of Disciplinary Rules 1-102(A)(1), 1-102(A)(4) and 1-102(A)(6).

V.

The documents evidencing the

Nine Hundred Thirty Thousand and no/100 ($930,000.00) Dollar loan to Moore & Associates, P.C., from Texas American Bank/Houston N.A. were executed on or about August 9, 1983.

VI.

Thereafter the loan was refinanced at First City National Bank of Houston in the original principal sum of One Million and no/100 ($1,000,000.00) Dollars, secured in part by a Four Hundred Ninety-Eight Thousand and no/100 ($498,000.00) Dollar certificate of deposit in the name of Blanche Taylor and a Four Hundred Thirty-Two Thousand and no/100 ($432,000.00) Dollar certificate of deposit in the name of Mary Taylor. In 1984,

Respondent defaulted and the Taylor aunts' certificates of deposit were applied against the indebtedness. Robert Allen Moore and the Law Offices of Moore & Associates, d/b/a Moore and Associates, P.C., filed for bankruptcy. The Taylor aunts learned over the course of the next few months that Respondent's representations regarding trial and/or settlement values of his personal injury cases were false and/or misleading as the cases either settled for less than Respondent had represented that they would settle for or were tried and lost.

VII.

Respondent knew or should have

known that the Taylor aunts, in makng a decision to allow their certificates of deposit to be utilized as collateral, were relying upon Respondent's acting as their grandnephew's attorney, to deal fairly, openly and forthrightly with them. Respondent took unfair advantage of the Taylor aunts' lack of knowledge and expertise regarding the vicissitudes of a personal injury trial practice in representing to them that repayment of the loans by Moore & Associates, P.C., for which they offered collateral was assured by Respondent's personal injury caseload. Respondent further failed to advise the Taylor aunts that they

should seek the advice of their own attorneys regarding the advisability of entering into the loan transactions with Moore & Associates, P.C.; rather, Respondent himself gave advice to the Taylor aunts, who were not represented by a lawyer in the loan transaction, even though the interests of his clients, the borrower, Moore & Associates, P.C., differed from those of a person or persons whose property was being utilized as collateral for the borrower's loan but who received no portion of the loan proceeds. Such conduct violates Disciplinary Rule 7-104(A)(2).

PRAYER

Petitioner prays that upon final

hearing hereof Respondent be REPRIMANDED, SUSPENDED or DISBARRED as the facts shall warrant, and that Petitioner have such other and further relief as may be proper and authorized by law and the State Bar Rules, including all costs of court, and for general relief.

Respectully submitted,

Frank J. Douthitt
General Counsel

Dawn Miller
Assistant General Counsel

Office of General Counsel
STATE BAR OF TEXAS
P.O. Box 12487
Austin, Texas 78711
(512) 463-1381

_____

By: Dawn Miller
State Bar Card No. 15561900

ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

This is to certify that the above and foregoing Second Amended Disciplinary Petition has been served on James P. Boldrick, attorney for Respondent, 1801 West Wall, Midland, Texas 79701, by delivery of a true and correct copy to him by certified mail, return receipt requested, by depositing same, enclosed in a postpaid, properly addressed wrapper in an official depository under the care and custody of the United States Postal Service on the 18th day of January, 1990.

_____

Dawn Miller

Supreme Court, U.S.
FILED
SEP 24 1992
OFFICE OF THE CLERK

(3)

No. 92 - 240

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ROBERT ALLEN MOORE,
Petitioner,

v.

THE STATE BAR OF TEXAS,
Respondent.

On Writ Of Certiorari
To The Supreme Court Of Texas

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

JACK N. PRICE
State Bar No. 16293000
410 Congress Avenue
Second Floor
Austin, Texas 78701
512/474-1563
FAX # 512/474-4727

Attorney for petitioner

Alpha Law Brief Co.* 6113 Aletha Lane* Houston, Texas 77081 (713)981-9000

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NO. 92-240

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ROBERT ALLEN MOORE
Petitioner,

vs.

THE STATE BAR OF TEXAS,
Respondent.

On Writ Of Certiorari
To The Supreme Court of Texas

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The State Bar make a number of statements of fact which are incorrect or which were sharply contradicted during the trial. Moore did not ask Taylor to help him secure a $100,000.00 loan, and did not suggest that Taylor approach his aunts for such a loan. S.F. Vol. II, pp. 55-57. Moore began searching for another bank to finance his practice before the Metro Bank closed, and the loan at the Texas American Bank had been arranged and approved

before Moore met with Taylor's aunts. *Id.*, pp. 62-64, 66-68. Mr Moore made no representation to the Taylor aunts that he might have to withdraw from Taylor's case unless financing was secured. S.F. Vol. III, p. 239. The list of cases was not prepared by Moore or at his request, *Id.*, pp. 62-64, 66-68, nor did he ever assure the Taylor aunts that the cases on the list were guaranteed to produce substantial amounts of money or represent that each case had a certain settlement value; and he did not assure them that a professional corporation could not file for bankruptcy. S.F. Vol. II, pp. 66-69; S.F. Vol. III, pp. 120, 209-210; S.F. Vol. IV, pp. 444, 450.

The State Bar also distorts the sequence of events leading to default in payment of the loan. Mr. Moore repaid the original $100,000.00 note. However, the Texas American Bank refused to substitute Moore's collateral and release the aunts' certificates of deposit as security for the remaining loan, S.F. Vol. III, p. 225, contrary to previous representations by banker Porterfield to the aunts and to Moore. *Id.*, p. 226. Mark Taylor's aunt, Mary Taylor, wanted to, and in fact did, sue Texas American Bank because it refused to honor its agreement to let Mr. Moore substitute his collateral as security and release the Taylor aunts' C.D.'s *Id.*, pp. 225-226. However, despite these problems, payments on the loan were current when the balance was accelerated. Mr. Moore was forced into a Chapter 11 bankruptcy proceeding as a result of actions by Mark Taylor, which are described in the Petition for Writ of Certiorari.

JURISDICTION

The State Bar contends that the Petition for Writ of Certiorari should be denied because jurisdiction has not been established in accordance with either Rule 10.1(a) or 10.1(b) of the Rules of the Supreme Court of the United States. It

is argued that since no federal question was decided by the state court of last resort, and Moore asserted due process arguments for the first time in his motion for rehearing of the application for writ of error, jurisdiction does not exist. The argument is contrary to the controlling authorities.

The Texas Supreme Court's denial of the motion for rehearing of the application for writ of error constituted a rejection of Moore's due process arguments. Thus, the court of last resort in Texas decided a federal question in a way that conflicts with decisions of one or more United States Courts of Appeals and with applicable decisions of this Court. Therefore, jurisdiction is proper under Rule 10.1(b) and (c).

The fact that the due process question was raised for the first time in the Texas Supreme Court does not defeat jurisdiction. In *Hildwin v. Florida*, 109 S. Ct. 2055, 2056 (1989) the Florida Supreme Court rejected, without discussion, the argument that the Florida capital sentencing scheme violated the Sixth Amendment, which was raised for the first time in the appeal. Nevertheless, the Supreme Court held that it had jurisdiction to decide the merits of the claim. The Court reached the same result in *Staylor v. Illinois*, 108 S. Ct. 646, 651, n. 9 (1988), in which the constitutional claim was not raised until the petition for rehearing in the Illinois Appellate Court; *Hathorn v. Lovorn*, 457 U.S. 255, 262-265, 102 S. Ct. 2421, 2426-2428, 72 L. Ed. 2d 824 (1982), in which the constitutional claims were raised, but not passed upon, in the Mississippi Supreme Court on petition for rehearing; *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), which quoted *Dury v. Des Moines*, 173 U.S. 193, 197-198, 19 S. Ct. 379, 380-381, 43 L. Ed. 665 (1899) to the effect that "[i]f the question were only an enlargement of the one mentioned in the assignment of errors, or if it were so connected with it in

substance as to form but another ground or reason for alleging the invalidity of the [lower court's] judgment" the court has jurisdiction; and *Webb v. Webb*, 451 U.S. 493, 101 S. Ct. 1889 (1981), which held that the court has jurisdiction if the record shows expressly or by clear implication that the federal claim was adequately presented in the state system, i.e., if a state court was timely apprised of the nature and substance of the federal claim.

In this case, there can be no doubt that petitioner's due process claim was squarely and adequately presented to the Texas Supreme Court in petitioner's motion for rehearing, that, prior to that time, the claim had been fully and clearly articulated in other assignments or error presented to the Texas Supreme Court in the Application For Writ of Certiorari, and that the Texas Supreme Court had adequate opportunity to address it. *See Appendix*. Accordingly, this Court has jurisdiction.

ARGUMENT AND AUTHORITIES

Contrary to the assertions of the State Bar, the Taylor affidavit clearly constituted "new charges" which were considered by the jury and addressed and comprehended by the sole question submitted to the jury, i.e., whether Moore had engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation. These new charges were introduced without granting Moore an opportunity to prepare or defend against them. Therefore, *In Re Ruffalo*, 390 U.S. 544, 88 S. Ct. 122, 20 L. Ed. 2d 177 (1968), which mandates that all charges must be known prior to commencement of trial, requires that this case be reversed.

The material contained in the Taylor affidavit was improperly admitted into evidence. It constituted an enlargement of the charges against Moore by the State Bar

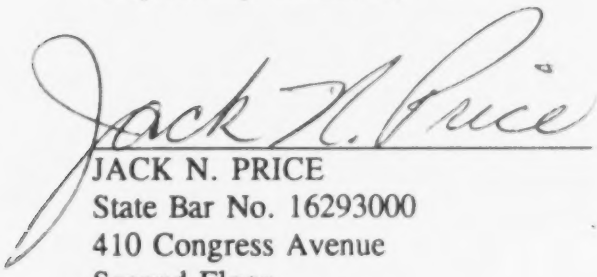
and a *de facto* amendment to its pleadings. The evidence submitted to the jury in the form of the affidavit included allegations of fraud, dishonesty, deceit, and misrepresentation not plead in the State Bar's petition for disbarment, and other scurrilous, unsubstantiated allegations against Moore. There was a considerable variance between the State Bar's pleadings and the evidence it was allowed to introduce, and on which the jury's verdict was based. The State Bar was not entitled to introduce the portions of the affidavit unrelated to the portion used for impeachment. The facts of this case are far different than those in the case of *In Matter of Peterson*, 439 N.W.2d 165 (Iowa 1989), on which the State Bar relies. Peterson was apprised of an affidavit against him prior to the hearing. Moore received no such notice and had no time to prepare to defend the irrelevant and highly prejudicial claims made in the Taylor affidavit.

The State Bar's contention that it had the right to argue that Moore defrauded the Taylor aunts by utilizing their credit to secure the loan then "walked away," while Moore was barred from testifying about repayments, is particularly specious. The argument obviously was damaging to Moore. Jurors' affidavits obtained after the trial attest to the fact that evidence of repayments would have materially affected their verdict. It is also obvious that the error in refusing to admit evidence of repayments by Moore on the issue of fraud, dishonesty, etc., could not be eliminated by allowing Moore to testify to the repayments during the sanctions hearing, as the State Bar suggests, even if he had been given such opportunity, which he was not.

SUMMARY AND CONCLUSION

For the reasons set out above, and in petitioner's petition for writ of certiorari, it is respectfully submitted that the petition for writ of certiorari should be granted, and the judgment below should be reversed and the cause remanded for retrial.

Respectfully submitted,



JACK N. PRICE
State Bar No. 16293000
410 Congress Avenue
Second Floor
Austin, Texas 78701
(512) 474-1563
FAX (512) 474-4727

ATTORNEY FOR PETITIONER

APPENDIX

Official Notice From Supreme Court of Texas

RE: Case No. D-1965
Style: ROBERT ALLEN MOORE
v. THE STATE BAR OF TEXAS

OFFICIAL RECEIPT
STATE OF TEXAS
April 6, 1992
STATE PENALTY
FOR PRIVATE USE

Petitioner's motion for rehearing of application for writ of error in the above styled case was this day received and filed.

JOHN T. ADAMS, CLERK

NO. D-1965

IN THE SUPREME COURT OF TEXAS

ROBERT ALLEN MOORE,
Petitioner,

vs.

THE STATE BAR OF TEXAS,
Respondent.

ON APPEAL FROM THE FOURTH COURT
OF APPEALS
SAN ANTONIO, TEXAS

MOTION FOR REHEARING

JACK N. PRICE
State Bar No. 16293000
410 Congress Avenue
Second Floor
Austin, Texas 78701
512/474-1563
FAX # 512/474-4727

ATTORNEY FOR PETITIONER

CERTIFICATE OF INTERESTED PARTIES

In order that the members of the court may determine disqualification or recusal pursuant to Tex. R. App. P. 131(a), petitioner certifies that the following is a complete list of the parties, their counsel, and all other persons known to have an interest in the outcome of this case:

1. Robert Allen Moore, the petitioner;
   307 North Grant
   Odessa, TX 79761

2. Jack N. Price, counsel for petitioner;
   410 Congress Avenue
   Austin, TX 78701

3. The State Bar of Texas, the respondent; and
   Office of the General Counsel
   P.O. Box 12478, Capitol Station
   Austin, TX 78711

4. Linda A. Acevedo, counsel for respondent.
   State Bar of Texas
   Office of General Counsel
   P. O. Box 12487, Capitol Station
   Austin, TX 78711

/s/ illegible
JACK N. PRICE
State Bar No. 16293000
410 Congress Avenue
Second Floor
Austin, Texas 78701
512/474-1563
FAX # 512/474-4727
ATTORNEY FOR PETITIONER

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NO. D-1965

IN THE SUPREME COURT OF TEXAS

ROBERT ALLEN MOORE,
Petitioner,

vs.

THE STATE BAR OF TEXAS,
Respondent.

ON APPEAL FROM THE FOURTH COURT
OF APPEALS
SAN ANTONIO, TEXAS

MOTION FOR REHEARING

TO THE HONORABLE SUPREME COURT OF TEXAS:

Petitioner, Robert Allen Moore, respectfully submits this Motion for Rehearing of denial of Application for Writ of Error.

Statement

Judgment of disbarment was entered against Moore based on a jury finding that he had engaged in "conduct involving dishonesty, fraud, deceit, or misrepresentation," on February 30, 1990, in Cause No. 17,508, 63rd Judicial District Court, Val Verde County, Texas, Judge Curt Steib, presiding. Tr. 407-11, 439-41. The State Bar's trial pleadings, i.e., its third amended disciplinary petition, S.F.

377-82, filed Jan. 19, 1990, alleged that in the spring of 1983, Moore asked his employee and client, Mark Taylor, to seek the assistance of Taylor's aunts in obtaining a line of credit for Moore, and that, at Moore's request, Taylor approached his aunts about utilizing their certificates of deposit as collateral for a loan of $100,000.00, and a second loan of $830,000.00. S.F. 377-78. The State Bar alleged that to secure the first loan, Moore represented to Taylor that if Moore was unable to secure the loan, he would have to withdraw from representing Taylor. Tr. 378. To secure the second loan, the State Bar alleged, Moore represented to Mary and Blanche J. Taylor:

(1) "that if the loan were not made, respondent would have to withdraw from representing [Mark] Taylor because of [Moore's] financial difficulties in continuing operation of his law firm and that said case would thereby be jeopardized;"

(2) "a settlement and/or a trial value of a number of respondent's personal injury cases;" and

(3) "that settlement funds sufficient to cover the payoff of the loan would be received prior to maturity of the loan."

Tr. 379.

The State Bar claimed that these representations were false and were made fraudulently for the purpose of inducing the Taylor aunts to pledge their C.D.'s as collateral for the loans, and that the Taylor aunts would not have done so had the misrepresentations not been made. Tr. 379-80. On the basis of these allegations, the State Bar claimed that Moore violated disciplinary rules 1-102(A) (1) (providing that a

lawyer shall not violate a disciplinary rule), (2) (providing that a lawyer shall not circumvent a disciplinary rule through actions of another), (4) (providing that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation), and (6) (providing that a lawyer shall not engage in any other conduct that adversely reflects on his fitness to practice law). The case was submitted to the jury on the single question of whether Moore engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, to which the jury answered "yes." However, this answer was heavily influenced by evidence of accusations against Moore contained in an affidavit by the State Bar's chief witness, Taylor, which were extraneous to the State Bar's pleadings and beyond the scope of the charge against Moore.

Despite the fact that the State Bar's petition gave notice only of the claim that Moore made misrepresentations to Mary and Blanche J. Taylor to induce them to pledge their C.D.'s for the loans to Moore, the court, at the instance of the State Bar, allowed the introduction, in its entirety, of the affidavit by Taylor which accused Moore of (1) "constant self-promotion," Tr. 579; (2) being in "extreme financial trouble," id.; (3) running through "the entire million [dollars borrowed] very quickly," Tr. 582; (4) refusing to try to settle Taylor's probate case "saying it could not afford it that tax year," id.; (5) engaging in business from his trust account. including paying personal bills, firm obligations, loans or "other activities," id.; (6) constantly paying off one client or group of clients late "and hoping more money would come in soon to pay the client or group of clients now far over due for their money," id.; (7) spending "in excess of 50% of his time juggling the accounts in trying to get money back into the trust account which had already been spent," id.; (8) participating in activities which were unethical, Tr. 583; (9) firing two secretaries, who appeared before the grievance committee regarding use of trust funds

and other matters, id.; (10) "constantly misrepresenting the value of pending cases," id.; (11) "making promises he did not keep," id.; (12) "alternating between despondent and threatening moods and demeanor and irrationality," id.; (13) "threatening to kill himself," id.; (14) threatening to see to it that lawsuits and proceeds disappeared in his Del Rio office "or across the border," id.; (15) constantly representing to Taylor's aunts, and Taylor, "the he [could not] avoid [the] debt legally, in any way, and that a professional corporation cannot file bankruptcy," id.; and (16) making other misrepresentations "too numerous to mention here but there are many." Id.

The petitioner complained, without success, in the court of appeals and in the petition for writ of error to this Court that the trial court committed reversible error in admitting the affidavit in evidence and allowing it to be taken to the jury room during the jury's deliberations. Petitioner has not wavered in the belief that admission of the affidavit was erroneous and that this and other trial errors required reversal, but these points, though reurged, will not be argued further. This motion for rehearing is based on the fact that the admission of the affidavit in evidence amounts to denial of fundamental rights of due process and constitutional safeguards guaranteed by the Constitutions of the United States and the State of Texas.

Denial of Federal Due Process Requirements:
Lack of Notice of Charges

The primary requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objection. Searcy v. The State Bar of Texas, 604 S.W.2d 256, 260 (Tex. Civ.

App.--San Antonio 1980, writ ref'd n.r.e.). To this end, Texas State Bar Rule 18(5) provides that a disciplinary petition shall allege:

> (4) a brief description of the acts and conduct that gave rise to the claimed professional misconduct sufficient to give fair notice, which allegations may be grouped in one or more counts;
>
> (5) the disciplinary rule or rules allegedly violated by such acts and conduct or other grounds for seeking sanctions...

Failure to comply with this rule, e.g., by omitting to enumerate each rule relied on to support a disciplinary judgment, "creates a significant potential for lack of notice that, in a proper case, might require reversal." *Vander Voort v. State Bar of Texas*, 802 S.W.2d 332 (Tex. App. -- Houston [1st Dist.] 1990, writ denied).

> Disciplinary and disbarment actions are
>
> adversary proceedings of a quasi-criminal nature. Cf., In Re Gault, 387 U.S. 1, 33, 87 S. Ct. 1428, 1446, 18 L. Ed. 2d 527. The charge must be known before the proceedings commence. They become a trap when, after they are under way, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh.

In re Ruffalo, 390 U.S. 544, 551, 88 S. Ct. 1222, 1225 (1968). In Ruffalo, the Supreme Court held that an attorney in an Ohio State disbarment proceeding was denied procedural due process because of the lack of fair notice as

to the reach of the grievance procedure and the precise nature of the charges against him even though he was given several months to respond to an additional charge made after the proceeding commenced. In this case, admission of the Taylor affidavit injected new charges of "dishonesty, fraud, deceit, or misrepresentation" against Moore which far exceeded the reach of the State Bar's petition and the charges it contained, and Moore was given no opportunity to prepare for or respond to the additional charges.

The Supreme Court of the State of Arizona reversed the disciplinary action taken against an attorney in the case of Matter of Myers, 795 P.2d 201 (Ariz. 1990) for the same reason given in Ruffalo, holding an attorney "may not be charged with one violation and then, without opportunity for hearing or presentation of evidence, be disciplined for another." Id., p. 204-05. Citing Ruffalo for the proposition "that a lawyer has a right to procedural due process in state bar proceedings," the court said that

> [i]n effect, the dissent argues that respondent may be charged with specified offenses and, despite the lack of evidence to support those charges, be found to have committed others that were neither charged nor the subject of any hearing. We reject such a proposition as failing to comport with elemental due process.

The Louisiana Supreme Court reached the same result in Louisiana State Bar Ass'n v. McGovern, 481 So.2d 574 (La. 1986).

> Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. (Citations omitted.) Thus, he is accordingly entitled to procedural due process,

> which includes fair notice of the charge. (Citations omitted.) As stated in Randall v. Brigham, 7 Wall. (74 U.S.) 523, 540, 19 L. Ed. 285, 293 (1869), in proceedings for disbarment which are "not taken for matters occurring in open court, in the presence of judges, notice should be given to the attorney of the changes made and an opportunity afforded him for explanation and defense."

Id., p. 576. Because McGovern had no notice that certain acts or omissions would be considered disbarment offenses until after he had testified, the court, "in order to protect [him] from an unconstitutional deprivation of due process" refused to consider them. Id., p. 577. In the present case, however, the jury was allowed to consider the additional acts and omissions set out in the Taylor affidavit, and affidavits from jurors establish that the jury's decision was based on the affidavit.

Under the Ruffalo doctrine, a disciplinary agency cannot sanction a licensee because of evidence of misconduct that comes to light in the trial unless it has been fairly charged in the petition. Shields v. City of Shreveport, 579 So. 2d 961, 968 (La. 1991). Failure to give fair notice of allegations against a licensee prior to a disciplinary trial constitutes a denial of procedural due process. See Burdge v. State Board of Medical Examiners, 403 S.E.2d 114, 116-17 (S.c. 1991), holding that failure to give fair notice of allegations against the licensee constituted a denial of procedural due process. In Comm'n on Pro. Ethics and Conduct v. Wenger, 454 N.W.2d 367, 369 (Iowa 1990) the Iowa Supreme Court stated that

> allegations of professional misconduct portend severe penalties and thus carry with them

> 'substantial procedural due process protection' (citations omitted.) . . . In Ruffalo, the Court recognized that when charges are not lodged against an attorney until the disciplinary proceedings are underway and the respondent has testified, the process may be transformed from a search for the truth to a trap for the unwary. (Citations omitted.) In ordinary civil or criminal litigation, such a violation of procedural due process would 'never pass muster.' Ruffalo, 390 U.S. at 551, 88 S. Ct. at 1226, 20 L. Ed. 2d at 122. Because lawyer disciplinary actions are quasi-criminal in nature, the Court held, 'the charge must be known before the proceedings commence.' Id. at 551, 88 S. Ct. at 1226, 20 L. Ed. 2d at 122.

Due process "prohibits sanctioning the attorney for unrelated misconduct revealed by the evidence in the disciplinary proceeding when the attorney had not been notified that the uncharged violations would be considered as disciplinary offenses or that he should be prepared to present a defense as to that misconduct." Louisiana State Bar Ass'n v. Keys, 567 So. 2d 588, 591 (La. 1990) citing Louisiana State Bar Ass'n v. McGovern, supra.2 "[I]n order to protect the respondent from an unconstitutional deprivation of due process, only the violations included in the charges of the bar association's petition will be considered." Nebraska State Bar Ass'n v. Dineen, 455 N.W.2d 178, 946 (Neb. 1990) citing Louisiana State Bar Ass'n v. McGovern, supra. The record in this case establishes beyond question that the trial court admitted hearsay evidence of claims of "dishonesty, fraud, deceit, or misrepresentation" which were beyond the scope of the charges made by the State Bar, without opportunity for Moore to prepare for or defend against them.

Under the authorities cited above, this was a denial of federal constitutional due process and requires reversal.

In Plunkett v. Estelle, 709 F.2d 1004, 1009 (5th Cir. 1983), the Fifth Circuit Court of Appeals said that

> [n]o principle of procedural due process is more clearly established than notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, . . . are among the constitutional rights of every accused.

The court determined that due process was denied "where the [court's charge] read with the jury argument and the evidence at trial [were] such that a reasonable juror could have convicted Plunkett of a distinct crime with which he was not charged." Id. at 1010. Plunkett's "constitutional right [was] the Sixth Amendment right 'to be informed of the nature and cause of the accusation . . .'" Id. The Fifth Circuit held that the difference between defenses for different charges "obviously would effect (sic) the defensive preparation. It is basic notice which was denied. We cannot find that denial to have been harmless. The denial was unconstitutional and prejudiced the defendant." See also United States v. Fooladi, 746 F.2d 1027 (5th Cir. 1984); Cupp v. Naughten, 94 S. Ct. 396, 414 U.S. 139 (1973).

Likewise, the injection into evidence of the additional claims and charges contained in the Taylor affidavit denied basic notice and unconstitutionally prejudiced Moore. As in Plunkett, this prejudice must also be considered in the context of the entire trial, or, as Judge Higginbotham observed "in the courtroom scene with all the props and scenery that there existed." Id. at 1008.

Plunkett dealt with a situation (submission of an erroneous charge) where the burden of proving denial of due process is more onerous than the burden in this case, which requires only a showing that claims and charges beyond those in the State Bar pleadings were allowed in evidence; nevertheless the facts of this case satisfy the Plunkett test for reversal. A reasonable jury could have considered (and, in fact, did consider) the claims in the Taylor affidavit in arriving at the verdict against Moore. Under Plunkett, this requires reversal.

Denial of Federal Due Process Requirements: Opportunity to be Heard

The second fundamental requirement of due process is the opportunity to be heard. In addition to being denied adequate notice of the charges and claims contained in the Taylor affidavit, Moore was denied adequate opportunity to be heard on the claim contained in the disciplinary pleading.

The trial court granted the State Bar's motion in limine restricting introduction of evidence of repayment of monies to the Taylor aunts. Tr. 425. During trial, Moore's counsel objected to testimony concerning events after Dec. 1, 1983, on the ground that the State Bar had stated in answer to an interrogatory that it did not contend that any misrepresentations were made after that date. S.F. 165-69. The Court responded that it would sustain the objection and rule that transactions after Dec. 1, 1983, were not to be mentioned before the jury, but only on condition that Moore's counsel not tell the jury that there was no evidence that the Taylor aunts were damaged. S.F. 170-74. When this assurance was not forthcoming, the court overruled the objection, saying that the evidence would not be allowed to show a breach of professional responsibility, but would be allowed "to complete the transaction that is already before

the jury." S.F. 175-76. Subsequently, the court permitted evidence that Moore defaulted in payment of the loan, and that the C.D.'s were applied to the loan. S.F. 190-91.

Thereafter, Moore's counsel sought to introduce evidence of payments made by Moore on the indebtedness after default, which the court had ruled inadmissible in sustaining the State Bar's motion in limine. S.F. 460. The court ruled that "the motion in limine stands" and barred evidence of Moore's payments on the loan. Id. Later, the court sustained objection to a question to Moore by his counsel regarding whether, in June 1984, Mary and Blanche J. Taylor sent him a written proposal regarding supervision of his law firm and allocation of income the firm received to payment of the debt. S. F. 465-66. Moore took exception to the ruling in which he detailed his counteroffer and efforts to make arrangements to pay the amounts owing. The court ruled that the testimony was not material and would open up "other areas" regarding collection of the debt. S.F. 480-81.

Thus, after permitting the State Bar to introduce evidence of default, the court refused to allow evidence that Moore had made substantial repayments, that he had endeavored to make arrangements for payments suitable to the aunts, and that he had been forced into bankruptcy by the action of Taylor and his aunts. These rulings presented a false picture of Moore as having secured the loan without any intent to repay it, which gave unwarranted credence to the contention that the Taylor aunts had been fraudulently induced to pledge their C.D.'s for the loan. The prejudicial effect of these rulings was aggravated by argument of State Bar counsel, who, after prevailing on the court to admit evidence that Moore defaulted in payment of the note and preventing evidence of the cause for the default, payments made, and arrangements for repayment, told the jury, in argument, that Moore utilized the love and affection the

aunts had for their nephew, Mark Taylor, "to get what he wanted, which was to wipe out his debts and walk away." S.F. 2/23/90, p. 14.

The trial court recognized that it was the State Bar's burden to prove that Moore knowingly made false statements and intended that the aunts rely on them, thereby fraudulently inducing the Taylor aunts to collateralize the loans. Id., pp. 3-5. Nevertheless, the court prohibited Moore from introducing evidence which established that he had no intent to defraud, while allowing the State Bar to bolster its case improperly by arguing that Moore never intended to repay the loan, but intended only to get his debts paid "and walk away." Moore has thus been denied due process by being refused the "opportunity to be heard," i.e., to offer evidence of payments and efforts to repay the loan which was probative, admissible, and directly responsive to the claim of fraud, dishonesty, deceit, and misrepresentation.

The combined effect of the actions by the trial court, detailed in this motion and in the application for writ of error, were at least as prejudicial as those of the court in Bethany v. State, 814 S.W.2d 455 (Tex. App.--Houston [14th Dist.] 1991), and denied Moore his rights to a fair trial and the effective assistance of counsel.

Denial of State Due Process Requirements

The state constitution imposes the same requirements of notice and opportunity to be heard in this case as does the federal constitution. See House of Tobacco, Inc. v. Robert S. Calvert, 394 S.W.2d 654 (Tex. 1965); Denton v. City of Austin, 587 S.W.2d 56 (Tex. Civ. App.--Beaumont 1979, no writ).

> Both the U.S. Constitution, Amendment Fourteen, Sec. 1; and the Texas Constitution, Article 1, Sec. 19, provide that no person shall be deprived of life, liberty, or property without due process of law. Fundamental to the concept of due process is the right to be heard. Fuentes v. Chevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972). The right to be heard assures a full hearing, the right to introduce evidence at a meaningful time and in a meaningful manner, and to have judicial findings based upon that evidence.

King v. Lindley, 697 S.W.2d 749, 752 (Tex. App.--Corpus Christi 1985, writ ref'd n.r.e.).

The Texas Constitution contains two separate due process provisions. Article 1, Sec. 19 sets out the traditional due process guarantee that no one "shall be deprived of life, liberty, property, privileges, or immunities, or in any manner disfranchised, except by the due course of the law of the land." Article 1, Sec. 13 prohibits excessive bail, excessive fines, cruel or unusual punishment and guarantees that all courts shall be open and every person shall have remedy by due course of law for an injury done him in his lands, goods, person, or reputation. See Sax v. Votteler, 648 S.W.2d 661, 664 (Tex. 1983). The federal constitution "sets the floor for individual rights; state constitutions establish the ceiling." LaCroy v. Hanlon, 713 S.W.2d 335, 338 (Tex. 1986). The Texas Supreme Court has been in the mainstream of the movement to look to the state constitution to protect individual rights. Id.

For the reasons set out in the preceding sections of this motion, it is clear that Moore has been denied due process rights guaranteed by the Texas Constitution, which requires that this case be reversed.

Summary and Conclusion

The trial court allowed additional "charges" in the form of that Taylor affidavit, to be leveled against Moore after trial commenced while refusing to allow him to be heard on those charges or on the State Bar's claim that Moore acted fraudulently by securing the loans and "walking away." The damaging statements contained in the affidavit were wholly unrelated to the limited portions of the affidavit read for the purposes of impeachment of Taylor. Moore had no opportunity to prepare to defend or defend against the charges, since their improper admission could not have been foreseen. Admission of the affidavit was obviously highly prejudicial, as is evidenced by jurors' affidavits obtained after the trial, which indicate that the affidavit was read during the jury's deliberations and played a major part in the jury's determination. Clearly, Mr. Moore has been denied due process, and this case should be reversed.

For the reasons set forth above, it is respectfully requested that this motion for rehearing be granted and that, upon rehearing, the case be reversed and remanded for new trial.

Respectfully submitted,

/s/ illegible
JACK N. PRICE
State Bar No. 16293000
410 Congress Avenue
Second Floor
Austin, Texas 78701
512/474-1563
FAX # 512/474-4727

ATTORNEY FOR PETITIONER

Certificate of Service

I hereby CERTIFY that a true and correct copy of the above and foregoing instrument has been mailed, via **CERTIFIED MAIL, RETURN RECEIPT REQUESTED**, to Ms. Linda A. Acevedo, Office of the Attorney General, P. O. Box 12487, Capitol Station, Austin, Texas 78711, on this the 6th day of April, 1992.

/s/ illegible
Jack N. Price